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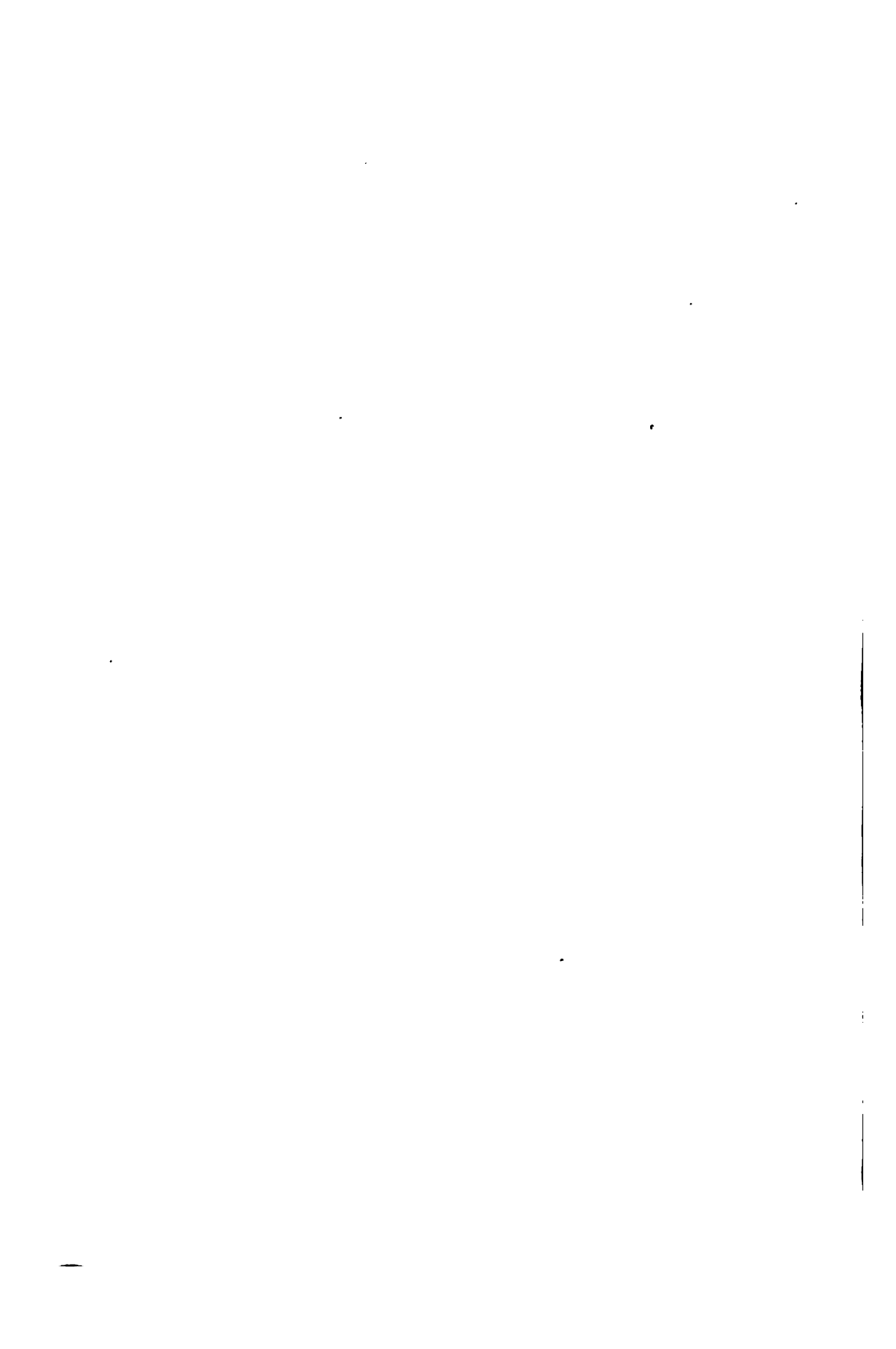
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WASHINGTON REPORTS

VOL. 39

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

MAY 3, 1903—SEPTEMBER 3, 1903

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JUDGES
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SUPREME COURT OF WASHINGTON

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ERRATA

Page 115, line 5, syllabus: For injuries, read injurious

Page 185, lines 1-2, syllabus: For SUPREME, read SUPERIOR

Page 205, line 5 from top: For Ln, read In

NOTED IN PREVIOUS VOLUMES

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Page 241, lines 5-6 from bottom: For Spokane county, Belt, J., entered May 16, 1904, read Lincoln county, Neal, J., entered May 3, 1904

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON.

(No. 5363. Decided May 3, 1905.)

WILLIAM McCORD, *Appellant*, v. JOHN ROSENE, *Respondent*.¹

DOMICILE—AT HOTEL—RESIDENCE OF FAMILY IN ANOTHER STATE.
A man may establish his domicile by actual residence at a hotel, coupled with an intention to remain, irrespective of the residence of his family, left in another state for the purpose of educating his children.

Appeal from a judgment of the superior court for King county, Griffin, J., entered September 15, 1903, upon the verdict of a jury rendered in favor of the defendant, in an action upon a foreign judgment. Affirmed.

L. H. Wheeler, for appellant.

John P. Hartman, for respondent.

PER CURIAM.—This is an action upon a judgment, rendered in the Yukon territorial court, in the Dominion of Canada, on June 22, 1899, in favor of appellant and against the respondent, for the sum of \$1,553. It is conceded that the action cannot be maintained unless it was commenced within two years from the date of the judgment sued upon. The complaint alleges that, during certain short periods of time, the defendant was absent from the state of Washington, by reason of which absence the length of time for the commencement of the action had been extended,

¹Reported in 80 Pac. 793.

and that the statute of limitations had not run. The answer alleged a continuous residence in the state. This question was submitted to the jury under proper instructions, and they found the issues in favor of the defendant. In this instance the defendant's family did not reside in this state, he having left them in the state of Illinois for the purpose of educating the children.

These matters were all submitted to the jury, and it is well established, as a matter of law, that a man's residence is not necessarily controlled by the residence of his family. *Cochrane v. Boston*, 4 Allen 177; *Pennsylvania v. Ravenel*, 21 How. 103, 16 L. Ed. 33; *Schlawig v. De Peyster*, 83 Iowa 323, 49 N. W. 843, 32 Am. St. 308, 13 L. R. A. 785; *Thompson v. State*, 28 Ala. 12; *Exchange Bank v. Cooper*, 40 Mo. 169; *Pearce v. State*, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135. It is also well established that a man's domicile is determined by his actual residence, coupled with his intention to remain, irrespective of the residence of his family. *Russell's Heirs v. Randolph*, 11 Tex. 460. Our own statute, Bal. Code, § 1322, provides that absence from the state on business shall not affect the residence of any person, provided the right to vote has not been claimed or exercised elsewhere.

The only fact which discriminates this case from the great number of cases deciding this point is that the residence of this respondent was at a hotel, viz., the Butler hotel, in the city of Seattle. But this fact, we think, cannot make any difference with the question of residence. In modern times many men establish and maintain their residences in hotels, for great periods of years, both with and without their families, and whether a man lives in a hotel or at a private dwelling, either owned by him or rented for the purpose of residence, can make no possible difference.

We think no error was committed by the court in its instructions on this question, and that the jury was warranted from the testimony in determining that the residence of

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the respondent was in the state of Washington. The other alleged errors are immaterial, and the judgment will therefore be affirmed.

(No. 5367. Decided May 3, 1905.)

THOMAS A. BRINGHAM *et al.*, *Appellants*, v. AMERICAN
BRIDGE COMPANY OF NEW YORK, *Respondent*.¹

CONTRACTS — LETTERS — ACCEPTANCE OF PROPOSALS — TIME OF DELIVERY NOT AGREED UPON. Where a proposition by letter to furnish certain materials for a building did not specify the time for delivery, and the letter accepting the proposal fixed the time within which delivery must be made, whereupon a reply was mailed not accepting the time of delivery but stating that the other party would be advised of the time in which delivery could be made, and six days later the advice was given that the material could not be furnished within the time fixed, no contract was entered into.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 26, 1904, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing an action on contract. Affirmed.

Benson & Hall, for appellants.

Root, Palmer & Brown, for respondent.

MOUNT, C. J.—Appellants brought this action in the court below to recover damages for an alleged breach of contract. The cause was tried to the court without a jury. Findings were made and a decree entered in favor of the defendant, from which decree plaintiffs prosecute this appeal.

The sole question in the case is whether or not a contract was made between the parties. The alleged contract was in the form of letters, as follows:

“Messrs. Bringham & Hoska, March 23, 1903.

“General Contractors, Seattle, Wash.

“Gentlemen: Referring to recent conversation relating to prices for work at Vancouver, we beg to make you the fol-

¹Reported in 80 Pac. 788.

lowing revised prices, and hereby offer to furnish all material hereinafter mentioned and contained in building No. 152-c; 75 H, and 75 K for the sum of seven thousand five hundred and ninety-seven dollars (\$7,597) delivered f. o. b. cars or on wharf, at Vancouver, Wash., in accordance with the plans and specifications furnished by the U. S. Government for the above named buildings. [Then follows a list of the materials.] Payments may be made as follows: eighty per cent upon the delivery of the material at Vancouver, and the balance within thirty days from the receipt of material, said payments to be made in proportion to the amount of material delivered.

“American Bridge Company of New York,

“By H. W. Jack, Contracting Manager.”

“March 23, 1903.

“American Bridge Company of New York,

“Seattle, Wash.

“Gentlemen: We hereby accept your proposition of this date for the furnishing of all metal work mentioned in your bid for the sum of seven thousand five hundred and ninety-seven dollars (\$7,597), delivered f. o. b. cars Vancouver, Wash. Basement columns to be delivered within sixty days from the receipt of the drawings and the balance of the columns within ninety days, the rest of the iron work shall be furnished in such time as it may be required in the building.

Yours very truly,

“Brigham & Hoska,

“By A. T. Brigham.”

“Messrs. Brigham & Hoska,

March 25, 1903.

“Vancouver, Wash.

“Gentlemen: Referring to your acceptance of the 23d inst., and in particular to the delivery of the goods mentioned therein, beg to state that we have reported that in case there should be any question about us not being able to make the delivery required by you, to advise you at once of such time as we may be able to fill your order, and thus give you an opportunity to purchase the material elsewhere, in case you could not wait for such delivery as we may be able to give you; we trust, however, that there will be no such condition existing as would warrant such action. We have also for-

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warded a copy of this letter to your Seattle address. Yours
very truly,

"American Bridge Company of New York,

"By H. W. Jack, Contracting Manager."

"Seattle, Wash., March 31, 1903.

"To Bringham & Hoska, General Contractors,

"Vancouver, Wash.

"Company telegraphed that on account of previous contracts they could not fill your order as required.

"American Bridge Company of New York."

"Seattle, Wash., March 31, 1903.

"Messrs. Bringham & Hoska, General Contractors,

"Vancouver, Wash.

"Gentlemen: We have this morning received a telegram from our Chicago office advising us that on account of previous contracts we would be unable to execute your order in accordance with the requirements mentioned in your acceptance, and immediately wired you as follows: 'Company telegraphed that on account of previous contracts they could not fill your order as required.' We very much regret to be obliged to give up this order, but when we informed you that we thought the work could be turned out in the time mentioned, we were acting in good faith, and presumed that some one of our works would be able to handle the work in that time.

"We trust that you may be able to place the order where you may be assured of the delivery that you require, and hope that you will appreciate the effort made by us to make absolutely sure of the delivery of your material and by ascertaining the facts place you in position to order elsewhere. It may be possible that you will have to pay a little more than our bid, but in this case the prompt delivery is of more importance to you. Yours very truly,

"American Bridge Company of New York,

"By H. W. Jack, Contracting Manager."

It will be noticed that the first letter was an offer to furnish materials at a stated price. No time for the delivery of these materials was specified. The second letter was a letter from appellants, accepting the offer at the price stated, but fixing a time certain for the delivery of the materials.

The third letter did not accept the provisions fixing the time of delivery, but informed appellants that they would be advised at once of the time in which the respondent would be able to fill the order. Six days later, by telegram and by letter, the appellants were informed that respondent could not fill the order as required. These letters themselves show clearly that no contract was entered into between the parties. They fail to agree upon the time within which the materials were to be delivered, and the negotiations then ended. The parties, therefore, did not agree, and there was no binding contract.

The judgment appealed from is therefore affirmed.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5369. Decided May 3, 1905.)

CHRISTOPHER ZEIMANTZ *et al.*, Respondents, v. J. W. BLAKE,
*Appellant.*¹

PLEADING—DEMURRER—WAIVER BY ANSWER. A demurrer to a complaint upon a specified ground cannot be made orally at the trial after the filing of an answer basing the defense on other grounds.

PARTIES—MINORS INTERESTED IN COMMUNITY PROPERTY—HOW BROUGHT IN. Upon objection being made that minors, interested in the community estate of their deceased father, are necessary parties plaintiff, it is proper to appoint their mother guardian *ad litem*, and to join them as parties plaintiff by the filing of an amended complaint.

VENDOR AND PURCHASER—TIME OF ESSENCE OF CONTRACT—FORFEITURE—TENDER PRIOR TO NOTICE. A contract for the purchase of land, in which time is of the essence, is not forfeited in equity upon default in payment of an installment of the purchase price, where tender is made before affirmative action on the part of the vendor in declaring a forfeiture, nor where the vendor extends the time for payment.

¹Reported in 80 Pac. 822.

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SAME — TENDER — AMOUNT OF — ESTOPPEL TO QUESTION — SPECIFIC PERFORMANCE—DEFENSES. Where the vendee tendered the amount which he claimed to be due on the purchase price of land, and the vendor refused the tender and defended an action for specific performance on the ground that there was no liability whatsoever under the contract, he is estopped to object that the tender was insufficient in amount.

HUSBAND AND WIFE—COMMUNITY PROPERTY—HUSBAND'S CONVEYANCE IN FRAUD OF CREDITORS—WIFE NOT BOUND BY. A release by a husband of interests in community property, made in fraud of creditors, cannot be held valid as between the parties where it was not made known to the wife.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered May 3, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, decreeing the specific performance of a contract to convey land. Affirmed.

Myers & Warren, for appellant.

Martin & Grant, for respondents.

PER CURIAM.—This is an action to enforce the specific performance of a contract to convey land. The following are, in substance, the facts found by the court: On March 11, 1902, the appellant, Blake, and one C. S. Thennes entered into a written agreement, by the terms of which the appellant agreed to sell and convey to Thennes certain real property, in the town of North Govan, Lincoln county, Washington, for the consideration of \$1,000, payable as follows: \$200 on the execution of the contract, and \$200 every six months thereafter until the balance of \$800 should be paid, with interest on deferred payments at 10 per cent per annum. The \$200 agreed to be paid on the execution of the contract was in fact paid, and the balance was evidenced by promissory notes of \$200 each, payable at the respective times mentioned in the contract. At the time of the execution of the contract, Thennes was a married man, having a wife and six children; and, together with his wife and

children, entered into possession of the property; and, between that time and the time of his death, which occurred on April 3, 1902, put permanent improvements on the property, consisting of a house, barn, and additions to buildings already thereon, of the value of \$1,000. Thereafter, at the request of the appellant, Thennes and wife paid out to the appellant's use \$150 for labor, which sum they were entitled to have credited as a payment on the contract of purchase. On March 2, 1903, Thennes tendered to the appellant the balance due on the contract and demanded a deed to the premises, but said tender and the request for a deed were refused.

It was further found that C. S. Thennes had, on September 16, 1902, signed a written agreement purporting to surrender to the appellant all his interests in the contract, but it was found that this was not signed or agreed to by the wife of Thennes, and was not intended as a surrender of Thennes' interests in the property, by either of the parties, but was for the purpose of protecting Thennes from certain of his creditors who had begun actions against him, in which actions the property was likely to become involved.

It was found further than Thennes died on April 3, 1902; that the respondent Zeimantz is his administrator, and that the respondent Amelia Thennes is the widow of C. S. Thennes, and the guardian *ad litem* of the minor respondents. It also appeared that the respondent Amelia Thennes, together with the minor respondents, had been, at all times since the death of C. S. Thennes, in possession of the property; that they had tendered to appellant the balance they thought to be due on the contract, and paid the money into court on the commencement of this action; that the tender was refused by the appellant, not on the ground that sufficient was not tendered, but on the ground that he was no longer obligated to perform the contract. The amount so paid was less than the court finally found to be due,

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and the respondents were directed to pay into court the difference between the amount tendered and the amount found to be due. On this being done, a decree was rendered directing the appellant to convey the property to the administrator of the estate.

The appellant assigns that the court erred in refusing to sustain his demurrer to the complaint. This is based on the contention that all of the payments provided for by the contract sued upon were not due at the time this action was brought, and for that reason the appellant could not be compelled to accept payment at that time of the full amount of the debt. The demurrer, however, was oral, and was interposed at the time of the trial, and, so far as the record shows, did not mention this as one of the objections to the complaint. Furthermore, the appellant had already filed an answer in which he based his defense on the ground that he was not obligated to perform the contract at all, without mentioning this objection. This was a waiver of the objection, even conceding it sound. The appellant must make his objections to pleadings known in the trial court before he can have them reviewed here.

The appellant complains of the manner in which the minor plaintiffs were brought into the case. Originally the action was begun by the administrator and Mrs. Thennes as plaintiffs, but on objection being made, the court required that the minors be made parties to the action. Being minors, and having no guardian, the court appointed Mrs. Thennes guardian *ad litem* for them, whereupon they joined in the suit by their guardian as parties plaintiff, an amended complaint being filed. The sufficiency of these proceedings is questioned, but the petition for the appointment, and the order making the appointment, seem to be in accord with the statute, and we hold them sufficient.

Under the general objection to the sufficiency of the evidence, the appellant discusses a number of questions. It is said that, in order to make a case, the respondents must

prove that all of the payments due under the contract up to the time of the final tender were paid or tendered at the time they fell due, as time was made of the essence of the contract, and a forfeiture occurred as of course on default of any payment. We cannot so construe the contract. This clause in the contract did not, of itself, forfeit the contract in equity simply because a payment was not made immediately on its falling due. Undoubtedly the party agreeing to make the sale could declare a forfeiture, and cut off the right of the other party to make the payments, but it required some affirmative action on his part. If he remained passive until the other party made tender of payment, he was obligated to accept it and to perform his part of the contract. However, in this case there was evidence, and the court found, that the appellant had expressly extended the time of payment. As the finding is supported by the evidence, the answer to the objection can rest on this ground.

It is complained in this connection that the tenders were insufficient, but we think the appellant is estopped to complain of this. Had he refused to perform the contract because he had not been tendered payment in full, and appeared in the action and defended on that ground, he probably could have succeeded in defeating a recovery of costs against him, if his contention should have proven true, though not the performance of the contract. But the appellant did not object to the tender when made on the ground that enough was not tendered him, nor did he defend this action on that ground. He denied any liability whatsoever under the contract, and it is on that ground that he must succeed now, if he succeeds at all.

It is said, also, that the purported release of the contract by C. S. Thennes is obligatory on the respondents, even though fraudulently made, on the principle that a transfer of property made to defraud creditors is valid as between the parties, and, being valid as between the parties, is valid as to the heirs and devisees. But this rule cannot apply

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here, even conceding that it would in any such case, as this assignment, if made in good faith, would not have had the effect of canceling the contract. The interest acquired by Thennes and wife in the property by the contract was community property, and some affirmative action on the wife's part, in connection with the release, was required to make it valid. In this release Mrs. Thennes took no part; in fact, it is not shown that she even knew of it until after her husband's death.

On the whole we think the evidence supports the findings, and that the findings support the judgment. The judgment will therefore stand affirmed.

(No. 5634. Decided May 3, 1905.)

THE STATE OF WASHINGTON, *on the Relation of Carrie A.
Krutz, Appellant*, v. WASHINGTON IRRIGATION
COMPANY, *Respondent*.¹

APPEAL—DISMISSAL—RETURN OF RECORD FOR CORRECTION—MISTAKE IN DATE OF SERVICE OF NOTICE. On motion to dismiss an appeal because it appears that the bond on appeal was not filed within five days after the apparent date of service of the notice, the appellant is entitled to have the record returned to the lower court for the purpose of correcting a mistake in the record as to the date of service, where the record was sent up prior to the motion and without any opportunity to the appellant to correct it below.

Motion to dismiss an appeal from a judgment of the superior court for Yakima county, Rudkin, J. Denied conditionally.

W. H. Bogle and *H. J. Snively*, for appellant.

E. F. Blaine and *Ira P. Englehart*, for respondent.

HADLEY, J.—Respondent has moved to dismiss the appeal in this cause, on the alleged ground that no appeal bond

¹Reported in 80 Pac. 803.

was filed within the time required by law. The record sent here is to the effect that the notice of appeal was served February 3, 1905, and that the appeal bond was filed on the 11th day of the same month. Upon the face of the record it is therefore apparent that the bond was not filed within five days after the service of the notice of appeal. If the record speaks the truth, the motion to dismiss should be granted, under repeated decisions of this court. In response to the motion, the appellant has filed affidavits to the effect that the notice of appeal was in fact served on the 7th day of February, and not on the 3d of that month. The affidavits state that it was first intended to make the service on the 3d, and that an acceptance of service was written upon the notice as of that date; but that, when the service was in fact made, four days later, the date theretofore written was by inadvertence overlooked and not changed.

Respondent insists that this court cannot consider the affidavits, and in support of its contention cites *Ward v. Springfield Fire etc. Ins. Co.*, 12 Wash. 631, 42 Pac. 119. The court there discussed the general principle of appellate procedure that the authenticated record imports verity, and cannot be aided by extrinsic evidence. But the opinion quotes approvingly from *Boyd v. Burrell*, 60 Cal. 280, to the effect that, if the record is incorrect, the fact must be made to appear by proper evidence to the court below, which tribunal has the power to correct so as to make the record speak the truth. After stating that the above is the settled doctrine of the courts, this court referred to the facts in the case then before it. The respondent's brief, which contained the motion to dismiss the appeal, was served several days before the transcript was forwarded to this court, and the appellant not only knew that the respondent intended to ask for a dismissal, but he had opportunity to apply to the lower court to correct the record. In the case at bar, however, notice of the motion before us was served April

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17, and the transcript was filed in this court April 15. It is therefore apparent that the record had left the court below when the motion to dismiss was served. At the time of the hearing here upon the motion to dismiss, appellant orally requested that the record be returned to the lower court in order that she may submit her evidence upon the subject of correction. The request was timely and, we think, should be granted. We do not undertake to consider or pass upon the evidence contained in the affidavits submitted here. We simply grant what we regard as a reasonable and timely request to have the record returned, so that it may be made to speak what is alleged to be the truth. The determination of the facts must be made by the trial court.

It is therefore ordered that the record shall be forthwith returned to the trial court for the purpose named. And it shall also be returned to this court within twenty days from the date of filing this opinion. If, in the meantime, the trial court shall correct the record so as to show that the appeal bond was filed within five days after the service of the notice of appeal, then the motion to dismiss shall be deemed to be hereby denied, and the appeal shall be heard in its course. Upon the other hand, if, upon the return of the record here, it shall remain as it now is in the particular mentioned, the motion to dismiss shall be deemed to be hereby granted, and an order shall be entered to that effect, without further hearing.

MOUNT, C. J., FULLERTON, RUDKIN, and ROOT, JJ.,
concur.

(No. 5240. Decided May 4, 1905.)

MARY F. WHITE, *Respondent*, v. WILLIAM CODD, *Appellant*.¹

WATERS—INJUNCTION—OBSTRUCTION OF STREAM BY LOGGING OPERATIONS—OVERFLOWING LANDS—TEMPORARY INJUNCTION—ADMISSION OF ACTS. A temporary injunction pending the action is properly granted to restrain a logger from storing logs in a river or slough in such a manner as to overflow its banks, wash away the soil, and prevent the cultivation of plaintiff's land, where the defendant's affidavit on the hearing admits the commission of such acts and the plaintiff's title to the land.

SAME — PRESCRIPTIVE RIGHTS — OBSTRUCTION OF STREAM FOR SIX YEARS. No prescriptive rights are acquired by the obstruction of a navigable river and the flooding of lands by the storage of logs therein for a period of six years.

SAME — MANDATORY INJUNCTION — REMOVAL OF LOGS, WHEN REQUIRED. A mandatory injunction pending the action may be granted requiring the removal of logs from the plaintiff's premises, where it clearly appears that the defendant, without any conceivable right, has obstructed a stream and floated logs upon the plaintiff's lands, and left them there, preventing cultivation of the land.

Appeal from an order of the superior court for Whitman county, C. F. Miller, J., entered March 19, 1904, after a hearing upon affidavits, granting a temporary injunction, in an action to restrain the obstruction of a stream. *Affirmed*.

John Pattison, for appellant.

J. T. Brown, for respondent.

PER CURIAM.—The plaintiff is the owner of one hundred and sixty acres of farming land, in Whitman county, through which flows the North Palouse river. Said river is navigable and a public highway for the purpose of driving and floating logs and timber products. The defendant, for about twenty-six years last past, has been engaged in conducting logging operations on said river. The complaint charges that,

"For six years last past, to wit: for the years 1898, 1899, 1900, 1901, 1902, and 1903, the said defendant was and

¹ Reported in 80 Pac. 836.

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now is engaged in the logging business above said land, upon land lying on and near said river, and during each and every of said years, the said defendant has cut and placed in said river, at a place above said land, large quantities of said logs, which he has driven and floated down said river to a place just below said land, and there allowed said logs to accumulate and remain, and from thence extending to and across said land in the bed and channel of said river, kept, retained, and stored said logs for a large portion of each and every of said years, thereby making a reservoir of said bed, channel and sloughs of said river, extending across said land, for storing, retaining and holding his said logs and thereby forming a jam and complete obstruction of said river on said land, and retarding and obstructing the natural flow of the waters of said river over and across said land, and causing the waters in said river to back up and raise to such an extent as to overflow and flood said land, and obstruct and interfere with the cultivation thereof for a large portion of each and every of said years, and thereby causing large quantities of said logs to float out of the bed and channel of said river, and over and upon said land, and allowed the same to remain thereon for a large part of each and every of said years, and thereby causing said logs so kept in said river to wash and wear away the soil of said land and the banks of said river on said land," etc.

The prayer of the complaint is for a temporary restraining order pending the action, and for a mandatory injunction requiring the defendant to remove certain logs from the plaintiff's lands. After notice, and upon a hearing had, the court made an order, the material parts of which are as follows:

" . . . then until the further order of the court in the premises, you, the said William Codd, defendant above named, and all your agents, attorneys, servants and employees, and all others acting in aid or assistance of you and each and every of you, do absolutely desist, and refrain during the pendency of this action, and until the further order of this court, from in any manner using the bed, channel or sloughs of the North Palouse river, which extends over and across the north half of the northwest quar-

ter of section twelve, and the south half of the southwest quarter of section one, all in township sixteen, north of range forty-three, E., W. M., in Whitman county, state of Washington, as a reservoir or place of storing, holding, retaining or accumulating saw logs, or from in any manner using any part of the above described premises as a reservoir or place of holding, storing, retaining or accumulating saw logs, or from in any manner holding, storing or accumulating saw logs in said river below the above described premises, in such a manner as to back or raise the water in said river so as to wash away or overflow the above described lands or any part thereof. And you, the said William Codd, defendant above named, are hereby further ordered to forthwith remove from the above described lands and from the bed, channel and sloughs of the North Palouse river extending over and across said above described lands, any and all saw logs now lying or being thereon or therein."

Two affidavits of the appellant were filed upon the hearing for the temporary order, and one of the respondent. The respondent's title to the land in question is admitted, as is also the commission by the appellant of many of the acts complained of. The rights of the appellant in the stream in question, as a part of the navigable waters of the state, are clearly defined by this court in *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245; *Ingram v. Wishkah Boom Co.*, 25 Wash. 191, 77 Pac. 34; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813; and *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662, 77 Pac. 1046. Under these authorities, there can be no question but that the appellant has, through a long series of years, trespassed upon the lands of the respondent and invaded her legal rights. The temporary order made by the court accords to the appellant the full measure of his rights in the stream in question as a part of the navigable waters of the state. The claim of the appellant that the respondent has forfeited her right to equitable relief, and that he has acquired a prescriptive right to flood the respondent's lands, cannot be sustained on the showing made, under the decisions of this court in *Rigney*

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v. Tacoma Light etc. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, and *Monroe Mill Co. v. Menzel*, *supra*.

As to the mandatory feature of the injunction, while the court will only grant a mandatory injunction pending the hearing on the clearest kind of a showing, yet the appellant has no conceivable right to float logs on to the respondent's land and leave them there, under any possible view of the case, and the action of the court in requiring their removal was therefore proper. Inasmuch as the case is not before us on its merits, a further discussion of the questions involved would be unprofitable.

There is no error in the record, and the judgment is affirmed.

(No. 5092. Decided May 4, 1905.)

GEORGE H. LEGHORN, *Respondent*, v. G. A. NYDELL,
Defendant, and AETNA INDEMNITY COMPANY,
Appellant.¹

INDEMNITY—GUARANTEEING BUILDING CONTRACT—PLEADING—COMPLAINT—SUFFICIENCY—PERFORMANCE OF CONDITIONS PRECEDENT—LEGAL EFFECT OF CONTRACT. In an action upon an indemnity bond guaranteeing the performance of a building contract, a complaint is not subject to objection, made for the first time at the trial, for failure to plead compliance with conditions precedent, where the bond and contract are not set out but are pleaded according to their legal effect and no conditions precedent appear.

SAME—DISCHARGE OF SURETY—PAYMENT OF INSTALLMENT PRIOR TO ITS MATURITY. In an action upon an indemnity bond guaranteeing a building contract, the surety cannot complain of a payment made by the owner to the contractor prior to its falling due, when the same was deducted from the last payment due and benefited rather than prejudiced the surety.

CONTINUANCE—DENIAL—ABSENCE OF WITNESS. A continuance to secure the attendance of a witness is properly refused where two

¹ Reported in 80 Pac. 833.

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other continuances had been granted for the purpose, the witness could not be found by the sheriff, and his mental condition was such that it was doubtful if he would be competent to testify.

INDEMNITY—RELEASE OF SURETY—DELAY OF CONTRACTOR—FAILURE OF OWNER TO TAKE CHARGE OF BUILDING. The owner of premises is under no obligation to take charge of and complete a building to lessen the demurrage charges on the contractor's default by delay, when the contractor was endeavoring in good faith to complete the building, and failure so to do does not release a surety on an indemnity bond.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 23, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an indemnity bond. Affirmed.

Root, Palmer & Brown, for appellant.

Jenner & Williams, for respondent.

PER CURIAM.—On the 12th day of June, 1902, the defendant Nydell, as contractor, entered into a contract with the plaintiff, Leghorn, as owner, for the construction of a building, in the city of Seattle, for the contract price of \$3,999. The contract provided that the building should be completed on or before October 1, 1902, and that the contractor should pay the owner \$3 for each day's delay in the completion of the building after said 1st day of October, 1902, as liquidated damages. On the date of the execution of the contract, the defendant Nydell and the defendant Aetna Indemnity Company entered into a bond, conditioned for the faithful performance of the above mentioned contract by the defendant Nydell.

The complaint does not contain a copy of either the building contract or the bond, but alleges, generally, the execution of the building contract and bond, the failure of the defendant Nydell to perform the same, and that the plaintiff was compelled to, and did, pay \$833.56 in excess of, and in addition to, the contract price, on vouchers approved by

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the defendant Nydell, and that such payments were necessary to prevent the expense and litigation incident to the filing of lien claims against the building and premises; also, that the building was not completed until seventy-six days after October 1, 1902. The prayer of the complaint was for a judgment in the sum of \$1,061.66, against Nydell, and for \$1,000, the full amount of the bond, against the Indemnity Company. The plaintiff had judgment in accordance with the prayer of his complaint, and the Indemnity Company appeals.

The first objection urged by the appellant is that the court erred in admitting testimony under the complaint, because it does not state facts sufficient to constitute a cause of action. The particular objection is that the complaint does not allege a compliance with the conditions precedent, contained in the bond and contract, to be performed by the respondent. The difficulty with which the appellant is here confronted is this: the complaint pleads the contract and bond according to their legal effect, and no conditions precedent appear therein. The complaint was sufficient, in the absence of a demurrer or a motion to make more definite and certain, and the objection was properly overruled.

The next objection urged is that the respondent paid the contractor the sum of \$300 at a time when the same was not due or payable under the terms of the contract. The facts in relation to this payment are these: The payments were due in installments under the contract, and were to be made on certificates of the architect. The first certificate was given July 10, 1902; the second, August 20, 1902; the third, September 5, 1902; and the fourth, November 11, 1902; and the payments were made on or about the same dates. On September 15, 1902, the respondent loaned or advanced to the contractor the sum of \$150, and a like amount on September 25, 1902. These amounts were repaid or deducted from the last certificate of November 11, 1902. Whether this was a loan, as claimed by the respondent, or

an advancement under the contract, as claimed by the appellant, is wholly immaterial. The money was used by the contractor in the construction of the building, and the appellant was benefited rather than prejudiced by the irregular payments.

The next objection is that the court erred in denying a motion for a continuance in order to enable the appellant to obtain the testimony of the defendant Nydell. Two continuances had already been granted the appellant on account of its inability to procure the testimony of this witness. A bench warrant had issued for him at the trial, and the sheriff was unable to find him. The witness' mental condition appeared to be such as to raise grave doubts as to the propriety of placing him on the witness stand, if found. Under such circumstances, the court did not abuse its discretion in refusing the continuance.

The last objection urged is that the respondent should have taken charge of the building and completed it himself, thereby lessening the amount of damages claimed for demurrage. This contention might be well founded, if the contractor had wholly abandoned the contract. But so long as he was endeavoring to fulfill the contract and complete the building in good faith, the owner was under no obligation to interfere with him. The Indemnity Company reserved the right to terminate the contract and take charge of the building for the same reasons, but it saw fit to pursue the same course as the owner. If the respondent remained subject to all the burdens and restrictions which the appellant would impose upon him, he might well ask himself why he required an indemnity bond.

There is no error in the record, and the judgment is affirmed.

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(No. 5303. Decided May 4, 1905.)

GEORGE WOOD, *Appellant*, v. MICHAEL EARLS *et al.*,
Respondents.¹

EJECTMENT—DEFENSES—PRIMA FACIE CASE—SUFFICIENCY—NONSUIT—JUDICIAL NOTICE OF FACTS NOT IN EVIDENCE. In ejectment, where the plaintiff makes out a *prima facie* case by a complete chain of title, the defendants' claim of title through earlier conveyances, adverse possession, or a judgment of a court of competent jurisdiction in another case, must be pleaded and proved, and it is error to grant a nonsuit by improperly taking judicial notice of such facts not put in evidence.

Appeal from the judgment of the superior court for Pierce county, Huston, J., entered November 25, 1903, dismissing an action of ejectment, on granting a motion for a nonsuit at the close of plaintiff's case. Reversed.

J. W. A. Nichols, for appellant.

John M. Boyle, *O. G. Ellis*, and *A. H. Denman*, for respondents.

PER CURIAM.—This was an action of ejectment. The complaint is in the usual form, alleging title in the plaintiff, and an ouster by the defendants. The answer is a general denial and a plea of title in the defendants, which is denied in the reply. At the trial below a nonsuit was granted, and from the judgment of dismissal the plaintiff appeals.

The appellant offered in evidence a complete chain of title from the United States to himself, and there was nothing in the appellant's case to defeat or impair the *prima facie* case thus made. If, as claimed by the respondents, the appellant has no title, by reason of a conveyance by one of his grantors of an earlier date than the one under which the appellant claims, or by reason of the final judgment of a court of competent jurisdiction which is binding upon the appellant, or by reason of adverse possession of the premises by the

¹ Reported in 80 Pac. 837.

respondents and those under whom they claim, it was incumbent on the respondents to plead and prove such facts. It is apparent, from an examination of the record, that the findings and judgment of the court below were not based upon the case made by the appellant, but rather upon extrinsic facts, of which the court improperly took judicial notice, such as the former judgment of this court in another case, and other matters appearing in the findings, concerning which the record is wholly silent.

The judgment of the court below is therefore reversed, with directions to deny the motion for a nonsuit, and proceed with the trial.

(No. 5242. Decided May 4, 1905.)

GEORGE E. FILLEY, *as Administrator of the Estate of*
Eliza J. Murphy, Deceased, Respondent, v.

A. H. CHRISTOPHER, *Appellant.*¹

FIXTURES—WHAT ARE—FURNACE, BOILER AND PIPES. A furnace and boiler in a theater building, resting upon solid foundations, and which could not be removed without tearing away masonry, together with the pipes and radiators connected therewith, are fixtures and pass upon a sale of the realty.

SAME—OPERA CHAIRS, CURTAINS, AND APPLIANCES IN THEATER. Opera chairs in a theater screwed to the floor, drop curtains, scenery, and the usual appliances, are fixtures and part of the realty within the criterion: (1) actual annexation to the realty or appurtenant thereto; (2) application to the purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party.

SAME—EVIDENCE OF INTENTION OF PARTY. The surrender of a ticket box with the sale of a theater building, by the person who placed it therein, may be considered as indicative of his intention, upon the question of its annexation to the realty as a fixture.

SAME—INSTRUCTIONS. Reading judicial decisions to the jury on the complex question of what constitutes a fixture is not to be commended.

¹ Reported in 80 Pac. 834.

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SAME—REMOVAL—INJURY TO BUILDING AND VALUE OF ARTICLE.
Instructions to the jury on the subject of what constitutes a fixture should not give too much prominence to the injury to the building from removal and the value of the article removed, which are circumstances to be considered, but not controlling.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered January 30, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Reversed.

Troy & Falknor, for appellant.

Israel & Mackay, for respondent.

PER CURIAM.—On the 16th day of November, 1894, John Miller Murphy and Eliza J. Murphy, his wife, mortgaged to A. A. Phillips, trustee, certain real property in the city of Olympia, upon a portion of which was situate the Olympia theater, for the purpose of securing the payment of certain indebtedness due the First National Bank of Olympia and others. On the 5th day of January, 1902, this mortgage was duly foreclosed, and the mortgaged premises ordered sold by a judgment and decree of the superior court of Thurston county. On the 8th day of March, 1902, the defendant in this action became the purchaser of the lots and lands upon which the Olympia theater is situate, at sheriff's sale, and is still the owner thereof. On the 3d day of November, 1895, Eliza J. Murphy died, intestate, and the plaintiff is the administrator of her estate. As such administrator, he brings this action in claim and delivery, to recover the possession of certain goods and chattels, situate in said Olympia theater, claiming the same as personal property belonging to the estate of said deceased. The defendant, on the other hand, claims that the property in controversy is not personal property, but is a part of the realty, and passed to him under the foreclosure sale above mentioned. The character of this property is the principal question involved

in the case. The plaintiff had judgment below, and the defendant appeals.

The motion to strike from the transcript, and the motion to dismiss the appeal, are denied.

So many different articles of property are involved that a separate discussion of each would subserve no useful purpose. At the close of the testimony, the appellant requested the court to instruct the jury to return a verdict in favor of appellant, as to certain articles of property particularly described, and we think a discussion of the questions involved in this request will be a sufficient guidance for the lower court upon a retrial of the case. The following articles were included in this request:

"One furnace, Denning No. 2, automatic with boiler; piping and plumbing material with radiators; triangle display board on sidewalk; 1 money drawer; 1 ticket box; 146 chairs, (opera), No. 10 (automatic); 134 chairs (opera), No. 6 (Torser back); 220 chairs (opera), balcony veneer; 1 drop curtain, damask; 1 drop curtain; 12 sets scenery; 1 lot stage rigging consisting of 50 sets of lines, chives, and blocks; set of gas light switches and by passes; gas piping throughout the house and fixtures; water plumbing, electric switch board, and 140 lights, fixtures and one dimmer, grooves, chains, belaying pins, chives."

The furnace and boiler in question were located in the basement of the theater building, and rested on a foundation built up through the floor. They were encased in brick work, and could not be taken out or removed without tearing away the masonry. The pipes extended from the boiler to the radiators, in different parts of the building, for the purpose of heating the same. Some of the radiators were not attached to the building otherwise than to the pipes connected therewith. Others were made of piping and hung on brackets. The pipes could be detached from the boiler by unscrewing them, and could be removed without material injury to the building, except to leave the holes through which they passed. The triangle display board was built of ship lap, and nailed

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to the sidewalk in front of the theater building. It was so constructed as to display a bill on either side of it. One of the respondent's witnesses testified that it was nailed down to keep people from turning it over. The money drawer ran in a groove underneath, and next to, the ticket window. It could be removed by simply loosening a screw. The ticket box consisted of a box four inches deep, made in two parts, which closed together. It contained a diagram of the theater, and slits were cut in it to represent each seat and its number. It was not attached to the building in any way. The five hundred chairs were situate in the body of the theater and in the balcony. The chairs were screwed to the floor, and were such as are in common use in such places. The drop curtains and scenery were attached to the staging, and could be removed without material injury to the building. The stage rigging was used for the purpose of handling the curtains and scenery. The electric switch was used for the purpose of lighting the different parts of the house, as necessity or convenience might require.

Little could be gained by a review of the authorities as to what constitutes a fixture. As said by this court in *Philadelphia Mtg. & Trust Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 72 Am. St. 138, 44 L. R. A. 559, "There is a wilderness of authority on this question of fixtures, and a hopeless conflict of decision." The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. Within this rule, we are of opinion that all, or nearly all, of the articles above referred to are fixtures, and a part of the realty.

Nearly all the authorities concur in holding that a furnace and boiler, together with the radiators and piping connected therewith, such as are above described, constitute a part of

the realty. *Thielman v. Carr*, 75 Ill. 385; *Folsom v. Moore*, 19 Me. 252; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273; *Raddin v. Arnold*, 116 Mass. 270; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, 15 Am. St. 235, 6 L. R. A. 249; *Goodin v. Elleardsville Hall Ass'n*, 5 Mo. App. 289; *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. 582; *Woodham v. First Nat. Bank*, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. 622. These views are not inconsistent with the decision in *Philadelphia Mtg. & Trust Co. v. Miller*, *supra*. In that case the boiler was in no manner attached to the building except by its plumbing connections.

We think the same rule applies to the opera chairs attached to the floor, the drop curtains, scenery, and appliances for raising and lowering the same, and the electric switch board. All these articles were attached or annexed to the building. They were a permanent accession to the freehold, and were no doubt intended as such. In *Grosz v. Jackson*, 6 Daly (N. Y.) 463, opera chairs such as are here involved were held to be a part of the realty. In *Capehart v. Foster*, *supra*, it was held that the title to steam radiators, an electric enunciator, and an office desk used in a hotel, passed by a foreclosure sale of the hotel. In *Woodham v. First Nat. Bank*, *supra*, it was held that the bar and back bar in a saloon passed by a foreclosure of the mortgage on the saloon building.

The other items included in the request are not of sufficient value to warrant an extended discussion. We deem it sufficient to say that, in our opinion, the bill board and the money drawer were sufficiently annexed to the building to become fixtures; and the ticket box, having passed into the hands of the purchaser by consent of the former administrator, should remain there. It has no value except in connection with the theater. While the present administrator is not estopped by the act of his predecessor in surrendering the possession of these articles to the purchaser at the

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foreclosure sale, nevertheless, the former administrator was the person who placed these articles in the theater building, and his act in surrendering possession to the purchaser was indicative of his view of their annexation to and connection with the building, and is entitled to consideration for that reason. On the same ground, the documentary evidence offered should have been received. The elimination of the above articles from the case disposes of practically all the errors assigned.

The witnesses, whose competency on the question of values was challenged, had, in our opinion, sufficient knowledge on the subject to be of some aid to the jury. The reading of judicial decisions to a jury on the complex question of what constitutes a fixture has a tendency to confuse and bewilder, rather than to enlighten, and the practice is not to be commended. It is unnecessary to comment further upon the question, as the judgment must be reversed for the reasons above stated. The injury that will result to the freehold by the removal of an article, and the value of the article after removal, are, no doubt, circumstances to be taken into consideration in determining whether a given article is a fixture or a chattel; but they are not controlling, and too much prominence was given these two features in the charge of the court.

This disposes of all the errors assigned. The judgment is reversed, with instructions to dismiss the action as to the articles enumerated in the request incorporated in this opinion, and for a new trial as to the remainder of the case, in accordance herewith.

(No. 5249. Decided May 8, 1905.)

ED. L. STOWE, *Respondent*, v. LA CONNER TRADING &
TRANSPORTATION COMPANY, *Appellant*.¹

DAMAGES—SPECIAL—ALLEGATION OF—SUFFICIENCY—PERSONAL INJURIES—SERVICES OF WIFE AS NURSE. In an action for personal injuries, the value of a wife's services as a nurse cannot be recovered unless specially pleaded, and evidence thereof is incompetent under an allegation of damages for expenses incurred for medicines and medical treatment, regardless of any motion to make the complaint more definite and certain.

DAMAGES—MEASURE OF—LOSS OF TIME—VALUE. In an action for personal injuries, it is competent to prove the reasonable compensation of a man engaged in ordinary labor in the business engaged in by the plaintiff.

SAME—PAIN AND SUFFERING—INSTRUCTIONS. In an action for personal injuries, an instruction to the effect that there can be no fixed measure of compensation for pain and suffering nor for loss of time, is not prejudicial when coupled with correct instructions as to the amount to be awarded therefor.

DAMAGES—EVIDENCE—OTHER ACCIDENTS—CROSS-EXAMINATION. In an action for personal injuries where the appellant's counsel asked a witness if there was any similar injury to another person at the same time and place, the appellant cannot complain if the same inquiry was pursued on cross-examination of the witness.

SAME—OWNERSHIP OF PREMISES. In an action for personal injuries sustained in falling from a dock, cross-examination of a witness as to the ownership of the dock is properly excluded when foreign to the subject-matter of the testimony in chief.

SAME—LIABILITY OF OTHER PARTIES—INSTRUCTIONS. In an action against the owner of a vessel for personal injuries sustained by a passenger in falling from a dock, an instruction to the effect that the plaintiff also had a cause of action against the owner of the dock, who was not a party to the suit, is properly refused.

APPEAL—REVIEW—NEW TRIAL—CONFLICTING EVIDENCE. Where there is a substantial conflict in the testimony, the verdict and a denial of a new trial are conclusive upon the supreme court.

WITNESSES—CREDIBILITY—CROSS-EXAMINATION. Upon cross-examination of a witness, it is proper to ask if he is in the employ of the party by whom he was called.

¹ Reported in 80 Pac. 856; 81 Pac. 97.

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APPEAL AND ERROR—DECISION—DAMAGES—REMITTING AMOUNT ERRONEOUSLY INCLUDED. Where the amount of special damages improperly included in the verdict can be ascertained from the evidence, the judgment may be affirmed upon the condition that the excess be remitted.

APPEAL AND ERROR—COSTS—BRIEFS NOT FILED IN TIME. Costs will not be allowed to appellant for the printing of a reply brief which was not filed within ten days before the hearing, where no extension of time was secured and no excuse is offered for the delay.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 20, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in falling from a dock. Affirmed upon condition of remitting \$100.

Ira Bronson and D. B. Trefethen, for appellant.

James A. Snoddy, for respondent.

PER CURIAM.—On the 26th day of October, 1902, the defendant, La Conner Trading & Transportation Company, was operating the steamer "Athlon," between the city of Seattle and other points on Puget Sound. On the above date, said steamer arrived in port at the city of Seattle about 7:30 or 8:00 o'clock in the evening, with the plaintiff on board as a passenger. As the plaintiff landed from the steamer, he stepped into an unguarded railroad slip, in the dark, about twenty-five or thirty feet from the end of the gang plank, and thereby injured one of his ankles. He brings this action to recover damages for the injury so received. The plaintiff had judgment in the court below, and the defendant appeals.

The first error assigned relates to the admission of testimony as to the value of the wife's services as a nurse while attending upon the respondent, and the instruction of the court permitting a recovery therefor. The principal objection to this testimony is based upon the ground that such damages are special, and were not specially pleaded. It is not claimed by the respondent that the damages were spe-

(No. 5249. Decided May 8, 1905.)

ED. L. STOWE, *Respondent*, v. LA CONNER TRADING &
TRANSPORTATION COMPANY, *Appellant*.¹

DAMAGES—SPECIAL—ALLEGATION OF—SUFFICIENCY—PERSONAL INJURIES—SERVICES OF WIFE AS NURSE. In an action for personal injuries, the value of a wife's services as a nurse cannot be recovered unless specially pleaded, and evidence thereof is incompetent under an allegation of damages for expenses incurred for medicines and medical treatment, regardless of any motion to make the complaint more definite and certain.

DAMAGES—MEASURE OF—LOSS OF TIME—VALUE. In an action for personal injuries, it is competent to prove the reasonable compensation of a man engaged in ordinary labor in the business engaged in by the plaintiff.

SAME—PAIN AND SUFFERING—INSTRUCTIONS. In an action for personal injuries, an instruction to the effect that there can be no fixed measure of compensation for pain and suffering nor for loss of time, is not prejudicial when coupled with correct instructions as to the amount to be awarded therefor.

DAMAGES—EVIDENCE—OTHER ACCIDENTS—CROSS-EXAMINATION. In an action for personal injuries where the appellant's counsel asked a witness if there was any similar injury to another person at the same time and place, the appellant cannot complain if the same inquiry was pursued on cross-examination of the witness.

SAME—OWNERSHIP OF PREMISES. In an action for personal injuries sustained in falling from a dock, cross-examination of a witness as to the ownership of the dock is properly excluded when foreign to the subject-matter of the testimony in chief.

SAME—LIABILITY OF OTHER PARTIES—INSTRUCTIONS. In an action against the owner of a vessel for personal injuries sustained by a passenger in falling from a dock, an instruction to the effect that the plaintiff also had a cause of action against the owner of the dock, who was not a party to the suit, is properly refused.

APPEAL—REVIEW—NEW TRIAL—CONFLICTING EVIDENCE. Where there is a substantial conflict in the testimony, the verdict and a denial of a new trial are conclusive upon the supreme court.

WITNESSES—CREDIBILITY—CROSS-EXAMINATION. Upon cross-examination of a witness, it is proper to ask if he is in the employ of the party by whom he was called.

¹ Reported in 80 Pac. 856; 81 Pac. 97.

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APPEAL AND ERROR — DECISION — DAMAGES — REMITTING AMOUNT ERRONEOUSLY INCLUDED. Where the amount of special damages improperly included in the verdict can be ascertained from the evidence, the judgment may be affirmed upon the condition that the excess be remitted.

APPEAL AND ERROR—COSTS—BRIEFS NOT FILED IN TIME. Costs will not be allowed to appellant for the printing of a reply brief which was not filed within ten days before the hearing, where no extension of time was secured and no excuse is offered for the delay.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 20, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in falling from a dock. Affirmed upon condition of remitting \$100.

Ira Bronson and D. B. Trefethen, for appellant.

James A. Snoddy, for respondent.

PER CURIAM.—On the 26th day of October, 1902, the defendant, La Conner Trading & Transportation Company, was operating the steamer "Athlon," between the city of Seattle and other points on Puget Sound. On the above date, said steamer arrived in port at the city of Seattle about 7:30 or 8:00 o'clock in the evening, with the plaintiff on board as a passenger. As the plaintiff landed from the steamer, he stepped into an unguarded railroad slip, in the dark, about twenty-five or thirty feet from the end of the gang plank, and thereby injured one of his ankles. He brings this action to recover damages for the injury so received. The plaintiff had judgment in the court below, and the defendant appeals.

The first error assigned relates to the admission of testimony as to the value of the wife's services as a nurse while attending upon the respondent, and the instruction of the court permitting a recovery therefor. The principal objection to this testimony is based upon the ground that such damages are special, and were not specially pleaded. It is not claimed by the respondent that the damages were spe-

cially pleaded, unless included within the statement that "plaintiff incurred and paid expenses for medicines and medical and surgical treatment of his said injuries in the sum of \$112.50."

The objection to this testimony, and the exception to the instruction complained of, must be sustained. Damages which necessarily result from the act complained of are denominated "general damages," and may be proved under the *ad damnum* clause, or general allegation of damage, while those which are the natural consequence of the act complained of, but not the necessary result of it, are termed "special damages." The defendant must be presumed to be aware of the damages which will necessarily result from the act done, and therefore he cannot be held to be taken by surprise when proof is offered of such necessarily resulting damage. But as to the damage naturally, though not necessarily, resulting from the act done, the defendant cannot be presumed to be aware of it, and therefore, in order to prevent a surprise on the defendant, it must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it at the trial. We think expenses incurred for nursing, doctor bills, etc., do not necessarily result from an injury, and therefore constitute special damages, within the above rule, and must be specially pleaded. Such is the general rule on this subject. 5 Ency. Plead. & Prac., 751.

Nor can we uphold the contention of the respondent that the item in question comes within the allegation of the complaint as to medicines, and medical and surgical treatment; first, because it does not come within the allegation as a matter of construction; and second, because the court admitted the evidence and permitted a recovery under the general *ad damnum* clause, and did not limit the respondent to the \$112.50 alleged in his complaint for medicines, medical and surgical treatment, and nursing. Nor is there any merit in the claim that the appellant should have moved to make the complaint more definite and certain. The com-

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plaint was already both definite and certain as to the claim for general damages, and the appellant had no means of knowing that special damages would be claimed.

The next assignment relates to the admission of testimony as to the reasonable compensation of a man engaged in ordinary labor, in the city of Seattle, at the time of the injury complained of. The respondent and the witness to whom this question was propounded were partners in the billiard and bar supply business. The witness traveled on the outside, and the respondent attended upon the store or place of business. The answer to the question was: "An ordinary laborer is worth somewhere about three to three dollars and a half a day in my business." Inasmuch as other parts of the record show that the respondent was engaged in that business, we do not think there was any prejudicial error in the admission of this testimony, especially in view of the fact that the court excluded testimony tending to show the correct measure of damages, at the instance of the appellant.

The next assignment is based upon the following extract from the charge of the court:

"You are instructed that there can be no fixed measure of compensation for the pain and suffering of body and mind, nor for the loss of time and care in business."

Waving the question whether this statement of the law is technically correct, as applied to damages for "loss of time and care in business," this portion of the charge, when coupled with the further instruction that, if the jury found for the respondent, they should award him such amount as would justly, fairly, and fully compensate him for the loss of time, if any, etc., could not mislead the jury or operate to the prejudice of the appellant.

The next assignment relates to proof of a similar injury to another person at the same time and place. Such testimony is not ordinarily competent, but the record discloses this situation: Counsel for appellant asked one of his wit-

nesses this question: "Was there any other man fell into the slip that night?" Answer: "No, sir, not to my knowledge." Counsel for respondent, on cross-examination of the same witness, pursued the same inquiry with the same result. Under these circumstances, the appellant will not be heard to complain of the error, if error it was.

The next assignment relates to the exclusion of evidence as to the ownership of the pier where the accident occurred, and the refusal of the court to give an instruction on the same question. The appellant sought to prove the ownership of the dock or pier, on the cross-examination of one of the respondent's witnesses. The court sustained an objection on the ground that it was not proper cross-examination. The ruling of the court in this regard was clearly right, as the question was wholly foreign to the subject-matter of the witness' testimony in chief. The instruction refused was to the effect that the respondent also had a cause of action against the dock owner for the same injury, if he had one against the appellant. This request was properly refused, as it mattered not who else might be liable to the respondent. That question was not before the court.

The next assignment of error relates to the refusal to grant a new trial. There was a substantial conflict in the testimony, and the finding of the jury and the action of the trial court in denying a motion for a new trial are conclusive upon this court in all such cases.

The last assignment relates to certain questions propounded to one of the appellant's witnesses on cross-examination. Counsel for respondent asked this witness, in effect, if he was in the employ of the appellant. There was certainly no impropriety in this.

We do not deem it necessary to grant a new trial, absolutely, on account of the first error discussed in this opinion. The testimony of the respondent was to the effect that his wife nursed him for about four weeks, and the testimony of the other witnesses was to the effect that such services

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were worth from twenty to twenty-five dollars per week. The judgment of the court below will be reversed, unless the respondent shall file with the clerk of this court a release of the sum of \$100 from the amount of said judgment, within thirty days from the filing of this opinion. But, upon the filing of such release, the judgment will be modified to that extent, and, as thus modified, the same will be affirmed. The appellant will recover its costs on this appeal.

UPON EXCEPTIONS TO COSTS.

[Decided June 7, 1905.]

PER CURIAM.—Respondent has filed exceptions to the taxation of costs on this appeal. The sum of \$18 was taxed in favor of appellant on account of its reply brief. Respondent excepts to said item on the ground that the reply brief was neither served nor filed ten days before the hearing; that there was no extension of time by stipulation or otherwise, and no excuse was offered for the delay. Laws 1901, pp. 30, 31, ch. 31, § 3, contains the following: "Not less than ten days prior to the hearing the appellant may also serve and file either with the clerk of the superior court or in the supreme court like printed brief or briefs, strictly in reply to respondent's brief." The same section also provides for an extension of the time, either by order of the superior court for good cause shown, or by stipulation of the parties. In the absence of such extension, the statute requires the reply brief to be filed, "Not less than ten days prior to the hearing." Appellant was, therefore, not entitled, as a matter of right, to file its reply brief when the same was filed, and for that reason respondent ought not to be charged with costs on account thereof. It is therefore ordered that the taxation of costs heretofore made in this appeal shall be modified to the extent of eliminating said item of \$18.

(No. 4854. Decided May 8, 1906.)

YESLER ESTATE, INCORPORATED, *Respondent*, v. H. E.
HOLMES, *as Executor etc., Appellant*.¹

ADVERSE POSSESSION—DISSEIZIN—ENTRY UNDER CLAIM OF RIGHT.
Adverse possession, to work a disseizin of the true owner, must be under a claim of right or color of title, and it is proper in ejectment to instruct a jury that an entry on the lands of another under a mistaken though honest belief that the same are public lands subject to entry, would not work a disseizin of the true owner.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 10, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action of ejectment. Affirmed.

W. D. Lambuth and *Richard Winsor*, for appellant.

Struve, Hughes & McMicken, for respondent.

PER CURIAM.—This is an action of ejectment, brought by the respondent against Charles F. Kraft and Mary Kraft, his wife, to recover the possession of certain lands which the respondent claimed formed a part of the donation land claim of Henry L. Yesler, to which it had succeeded by virtue of certain mesne conveyances from the heirs and devisees of his estate. Kraft and wife, answering the complaint, denied that the respondent had title to the property, or that it was ever a part of the donation land claim of Henry L. Yesler; and, as an affirmative defense, alleged that the land was the property of the state of Washington, of which they were rightfully in possession, and that they had held possession of the same, openly and notoriously, adverse to all the world, except the state of Washington, for a period of more than ten years. The new matter in the answer was put in issue by a reply; and a trial was had on the issues thus made, before the court sitting with

¹ Reported in 80 Pac. 851.

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a jury, which resulted in a verdict and judgment for the respondent. From the judgment, Kraft and wife appealed. Subsequent to the appeal, both of the appellants died, and H. E. Holmes was appointed executor of the one, and administrator of the other. By order of this court, he was substituted in the place of the deceased appellants, and continues the prosecution of the appeal in his representative capacity.

A number of errors are assigned, but as the appellant has discussed in his brief only those assigned on the giving of certain instructions, and the refusal to give certain others, we will notice these only. Counsel have been more than brief, both in their argument and in their references, and we have had some difficulty in ascertaining just what the precise objections to the instructions given are; but, as we understand it, they find fault with that part of them in which the court undertakes to define to the jury what constitutes adverse possession.

On this subject the court, in substance, instructed the jury that, under our statute, the rightful owner of real property is seized of the same, whether he is in possession of it or not, and that disseizin can only occur where there is an adverse and hostile entry; that an entry, to constitute an adverse or hostile entry, must be under a claim of right, made for the purpose of dispossessing the owner; and that an entry on the lands of another, under a mistaken, though honest, belief that such lands are public lands and subject to entry, would not work a disseizin of the true owner. It is contended that the court has here laid down a more harsh rule than the law warrants, in that mere possession, if sufficiently open and notorious to apprise the community that the land is in the possession of the occupant, will work a disseizin of the true owner. But the instructions are in accord, it seems to us, with the cases of *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30; *Moore v. Brownfield*,

7 Wash. 23, 34 Pac. 199; and *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330. In the last cited case, we said:

“Without especially reviewing all the cases cited by either the appellants or respondent, the overwhelming weight of authority seems to be that the basis of an adverse possession is a claim of title or right. An entry can only be made by the seizin of the claimant, or by an ouster of the owner of the freehold. There must be a disseizin before another can become legally possessed of the lands, and this, of course, can only be done by some act which works a disseizin of the original owner, for the seizin cannot abide in two claimants at the same time. And as the statute of limitations will not commence to run until this seizin, it becomes necessary to determine what acts will constitute a disseizin or dispossession of the original claimants. First, there must be an intention; that is, an entry for the purpose of dispossessing the owner. That intention, of course, must be determined by the acts of the usurper; and before the right of the owner could be extinguished, and his divestment established, and in investiture created for the usurper, there must, of necessity, be an adverse possession on the part of the new claimant. And while it is true that the statute provides that no action shall be maintained unless the plaintiff has been possessed within ten years, yet the question of whether or not the original owner is so disseized must of necessity, in a case like this, depend upon whether or not there has been an adverse possession of the defendants during the statutory period. For the disseizin can only occur where there is an adverse or hostile entry. This court has said in *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30, that the entry must be under claim or color of title, or it would not ripen into title.”

Under the rule of these cases, a mere naked possession is not sufficient to constitute adverse possession under the statute. Possession, to be adverse, must be actual, open, notorious, continuous, and under a claim of right or color of title. The instructions complained of did not go beyond this rule. Nor was the instruction contrary to *Moore v. Brownfield*, 10 Wash. 440, 39 Pac. 113. In that case the owner himself had put the claimant in possession, disclaiming all in-

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terest in the property, and stating that it belonged to the government. It was held that this disclaimer and these representations estopped the owner from asserting the contrary, even though they were made in good faith, and in the belief that the land was government land.

The instructions requested and refused require no special consideration. Those that were pertinent and proper were substantially given, and this is all that a litigant can require. There is no error in the record, and the judgment will stand affirmed.

(No. 5267. Decided May 8, 1905.)

J. M. ADAMS, *Respondent*, v. JOHN T. CASEY *et al.*,
Appellants.¹

APPEAL—REVIEW—FINDINGS NOT EXCEPTED TO. In an action at law, tried without a jury, findings to which no exceptions are taken must be considered as the facts in the case.

PLEADING—ANSWER—REPLY TO DENIAL NOT REQUIRED. In an action upon a promissory note an answer which "denies that there was any consideration . . . but alleges that the same was given for security only," is no more than a denial requiring no reply.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 27, 1904, upon findings in favor of the plaintiff after a trial before the court without a jury, in an action upon a promissory note. Affirmed.

Casey & Casey and Solon T. Williams, for appellants.

Byers & Byers, for respondent.

PER CURIAM.—This action was brought upon a promissory note. The complaint is in the usual form in such actions. The answer, omitting the formal parts, is as follows:

"(1) Denies that there was any consideration in the note described in paragraph 1 of the complaint, but alleges that

¹Reported in 80 Pac. 853.

the same was given for security only to the plaintiff. (2) Denies that there is anything due from the defendants to plaintiff on said note or otherwise."

No reply was filed by the plaintiff. When the cause was brought on for trial, defendants moved for a judgment on the pleadings. This motion was denied. The cause was thereupon tried to the court without a jury. The court made findings in favor of the plaintiff, and entered a judgment for the amount alleged in the complaint. Defendants appeal.

Appellants took no exception to the findings of the court. These findings must, therefore, be considered as the facts in the case. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501.

Appellants argue that the court should have granted the motion for judgment on the pleadings. The answer of defendants was no more than a denial of the facts pleaded in the complaint, and therefore required no reply.

The judgment is affirmed.

(No. 5147. Decided May 8, 1905.)

BESSIE FICKETT, *Respondent*, v. FOSTER FICKETT,
Appellant.¹

DIVORCE—CUSTODY OF CHILDREN—REVIEW—EVIDENCE—SUFFICIENCY. In an action for a divorce and the custody of children 10 and 11 years of age, where the court grants the husband a divorce upon his cross-complaint, but awards to the wife the custody of the children, together with \$30 per month for their support, the findings will not be reversed on appeal where the court appears to have decided with the weight of the evidence and for the best interests of the children.

Appeal from a judgment of the superior court for King county, Bell, J., entered March 29, 1904, after a trial on

¹ Reported in 80 Pac. 1134.

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the merits before the court without a jury, decreeing a divorce and awarding the custody of the children. Affirmed.

Charles R. Crouch, for appellant.

Weter & Roberts, for respondent.

PER CURIAM.—The respondent sued for divorce, and for the care and custody of the minor children of herself and husband, said children being a girl of the age of eleven years and a boy of the age of ten years. The appellant appeared in the action, put in issue the allegations on which the respondent relied, and filed a cross-complaint in which he asked that a divorce be granted him, and that he be awarded the care and custody of the children. The court heard the evidence of the parties and rendered a decree in which it awarded the appellant a divorce on his cross-complaint, but awarded the children to the respondent, and directed that the appellant pay to her \$30 per month for their support. This appeal is from that part of the decree awarding the respondent the custody of the children and directing that the appellant pay \$30 per month towards their support.

The questions presented by the appeal are wholly questions of fact, and these have been ably and exhaustively presented, both orally and by briefs. But, as we have often said, it serves no useful purpose for this court to discuss evidence for the mere purpose of determining on which side its weight preponderates. Such arguments are rarely, if ever, convincing to the losing party, or his counsel, and are of no interest to the general profession, because never useful as precedents. It is sufficient, therefore, in this case, to say that we have examined the record with care, and feel that the court decided with the weight of the evidence, and for the best interests of all the parties concerned. If it should hereafter prove that a change in the custody of the children is desirable, or that the order requiring the appellant to pay money for the children's support should be

come oppressive, changes therein can be made to meet the changed conditions, by applying to the court that granted the decree, or the court that attempts to enforce the orders.

The judgment is affirmed.

(No. 5458. Decided May 8, 1905.)

W. H. WISER, *Respondent*, v. L. R. THOMAS, *Appellant*.¹

EXEMPTIONS—CLAIM BY DEBTOR—LIST OF PROPERTY—SUFFICIENCY.
Where goods levied upon are claimed as exempt by the debtor, under Bal. Code, § 5255, a second list by separate items of the property claimed as exempt is not necessary, where the sworn statement delivered to the officer contained a list of all the debtor's property and claimed all of it as exempt.

SAME—VALUE OF PROPERTY—COMPLAINT—PLEADING AND PROOF.
Where property levied upon was claimed as exempt by the debtor, who admitted at the trial that part of it was not exempt because the judgment was for unpaid purchase money thereon, the fact that the debtor's sworn statement, and also his complaint, alleged the value of all the property to be \$250, does not confine his proof of the total value to such sum, or limit his recovery to the difference between such sum and the value of the non-exempt property; but he is entitled to show that exempt property of the value of \$250 was levied upon and taken.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered January 27, 1904, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for conversion. Affirmed.

Kauffman & Frost, for appellant.

John B. Davidson, for respondent.

Crow, J.—This action was commenced by respondent against the appellant, L. R. Thomas, as sheriff of Kittitas county, to recover damages growing out of the failure of said appellant to deliver to respondent certain goods, levied upon by appellant, and demanded by respondent as exempt

¹ Reported in 80 Pac. 854.

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from execution. In compliance with Bal. Code, § 5255, respondent delivered to appellant, as such sheriff, a sworn statement, alleging that he was a householder residing in Kittitas county, said statement containing an itemized list of all personal property owned or claimed by him. In the same document it was stated that respondent claimed all of the property therein described, as exempt from execution and sale, the value of said property being fixed by respondent at \$250. The judgment creditor having made no demand for an appraisement, no appraisement was had, nor was any of the property levied upon returned to respondent. In his complaint respondent again alleged the value of all said property to be \$250. On the trial, judgment was entered in his favor, for the said sum, and this appeal has been taken.

Appellant, in his answer, with other defenses, alleged that a portion of the goods levied upon were not exempt from execution, for the reason that the judgment under which such levy was made had been obtained for the purchase price thereof, and alleged the value of the goods not exempt to be \$200. This portion of the answer was not denied.

On the trial respondent offered in evidence the sworn statement delivered to the sheriff by him. To said offer, appellant objected, for the reason that the said statement did not comply with the requirements of said § 5255, in that respondent had not also delivered to the sheriff a list by separate items of the property he claimed as exempt. It is the contention of appellant that two lists should have been presented: First, one containing an itemized statement of all personal property owned or claimed by respondent; and second, another list containing by separate items all of the property which he claimed as exempt. It appears, however, that respondent claimed as exempt all of the property owned and mentioned by him in his itemized list. We think this was a substantial compliance with the statute, and that no error was committed in admitting said sworn statement.

Upon the trial respondent admitted that the portion of the goods referred to in the answer were not exempt, by reason of the fact that the judgment under which the levy had been made had been obtained for unpaid purchase money thereon. While upon the witness stand, respondent was asked the value of all of said goods, including those exempt and not exempt; and, over the objection of appellant, was permitted to testify that they were all of the total value of \$450. The ground of appellant's objection was that, as respondent had alleged the value of all goods, exempt and non-exempt, to be only \$250, the correct method of measuring his damages would be to prove the value of the goods not exempt, deduct the same from said \$250, and allow respondent judgment for the balance. Other exceptions were taken to the admission of evidence, but they all involved the same principle contended for by appellant.

We think no error was committed by the court in admitting respondent's evidence. On this point, while it is true respondent alleged the value of all of the goods to be \$250, we do not think the proper method of ascertaining the value of the portion exempt is that stated by appellant. If, in fact, all of the goods were worth \$450, as testified by respondent, and the portion found to be exempt was of the value of \$250, respondent certainly should have been permitted to show such actual value of the goods exempt, not in excess of the amount alleged in his complaint. The trial court, upon the evidence, fixed the value of the goods ascertained to be exempt at \$250, and judgment was entered accordingly.

There being no error in the record, the judgment is affirmed.

MOUNT, C. J., DUNBAR, and ROOT, JJ., concur.

FULLERTON, HADLEY, and RUDKIN, JJ., took no part.

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(No. 5274. Decided May 8, 1905.)

H. C. ERICKSON, *Appellant*, v. CHRISTINA MURLIN *et al.*,
Respondents.¹

BOUNDARIES—ADVERSE POSSESSION—DETERMINING DISPUTED BOUNDARY LINE. A boundary line between two city lots may be determined by adverse possession for the statutory period, where the party purchased the lot inclosed by a fence including the twenty-one inches in dispute, immediately built a house thereon so close to the line that the drip from the eaves fell upon the strip of land in question, and resided thereon maintaining the fence in the same place and improving the disputed strip in the same manner as the balance of the lot, openly, continuously, and under a claim of right.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 30, 1904, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing an action of ejectment. Affirmed.

William Wray, for appellant.

Winsor & Hadley, for respondents.

FULLERTON, J.—In this action the appellant sought to recover from the respondents a tract of land, described as the north twenty-one inches by one hundred and twenty feet of lot nine, in block twenty-six, of Sarah A. Bell's Second Addition to the city of Seattle. In his complaint the appellant alleged that he was the owner in fee simple of the tract described, that the respondents were wrongfully in possession of the same, and wrongfully and unlawfully withheld such possession from the appellant. The respondents answered, denying that the tract claimed by the appellant was, or ever had been, a part of lot nine, as alleged in the complaint; and alleged affirmatively that they and their predecessors in interest had been in the open, notorious, and exclusive possession of the tract so claimed since April 5, 1889, holding the same adversely to all the world. The appellant put

¹ Reported in 80 Pac. 853.

in issue by a reply the affirmative matter of the answer. The action was tried by the court without a jury, which found with the respondents on all of the issues; finding that the respondents were not in possession of any part of lot nine, mentioned in the complaint, and that they, and their predecessors in interest, had held the tract claimed by the appellant, adversely to all the world for the period of the statute of limitations.

The appellant contends that these findings are against the weight of the evidence; that all of the competent evidence showed that the fence, thought to mark the dividing line between the respective lots of the parties, was twenty-one inches from the boundary line on the appellant's lot; and that such possession as the respondents and their predecessors in interest held of it was held up to the year 1900 under a mere mistake as to the true boundary line, and has only been adverse since that time.

Whether the true boundary line is as contended for by the appellant, or is as found by the court, we shall not inquire, as we think the respondents have title by adverse possession. The record shows that the respondent Murlin and her then husband, E. P. Edsen, purchased lot eight, in the block in question (the lot adjoining the lot now held by the appellant), on April 5, 1889; that the lot was then inclosed by a fence, and that the fence marked the dividing line between lot eight and lot nine at the place where the fence now marks it; that they entered into possession of the lot immediately after its purchase, and, during the summer of that year, erected a house thereon at a cost of two thousand dollars; that they moved into the house and resided therein together until the respondent succeeded to the interests of her husband, since which time the respondent has resided therein by herself. It further appeared that the house was built so close to the fence marking the dividing line between the lot eight and lot nine that the drip of the eaves therefrom falls upon the twenty-one inches in dispute. It also

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appeared that, since the entry of the respondent and her husband, in 1889, the possession of the property by respondents has been actual, open, notorious, continuous, and under a claim of right; and that this part of the property has been improved in the same way that other parts of the lot were improved, and the same acts of ownership have been exercised over it as were exercised over such other parts. It seems to us that this is inconsistent with any other theory than that of adverse possession. And unless it is to be held that boundary lines cannot be determined by possession and claim of right upon the one side, and acquiescence upon the other, we know of no reason why the respondents may not claim title by adverse possession in this instance. The general rule, as we understand it, is that boundary lines may be determined by adverse possession, and we so held in *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936.

The judgment appealed from is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5202. Decided May 8, 1905.)

CHARLES H. BURNETT, JR., *Respondent*, v. ALBERT M. EWING *et al.*, *Appellants*.¹

APPEAL—EXCEPTIONS—ORDER EMBODIED IN JOURNAL ENTRY. An order refusing leave to file a supplemental complaint is reviewable on appeal without any formal exceptions, where it is embodied in a written order and journal entry in the cause.

PLEADING—SUPPLEMENTAL ANSWER—SUFFICIENCY—LEAVE TO FILE. The fact that a proposed supplemental answer is not sufficiently full and particular to conform to the rules of good pleading is no justification for refusing leave to file it, where it contained the substance of a good defense.

¹ Reported in 80 Pac. 855.

TENANCY IN COMMON—MECHANICS' LIENS—PURCHASE OF OUTSTANDING LIENS—PLEADING—REAL PARTY IN INTEREST—SUPPLEMENTAL ANSWER SHOWING PLAINTIFF TO BE TRUSTEE OF COTENANT—SUFFICIENCY. Where the leasehold interests of tenants in common were being subjected to a mechanics' lien foreclosure, and one B purchased the interests of the plaintiff and was substituted as party plaintiff in the foreclosure suit, a supplemental answer by two of the defendants states a good defense to the action, where it alleges that B was not the real party in interest, but was the agent and trustee of their codefendant, who had purchased the liens of the plaintiff; since the codefendant as a tenant in common cannot buy up an outstanding incumbrance and foreclose against his cotenants without showing an exclusive liability for the whole thereof; and it is error to refuse leave to file such an answer.

MECHANICS' LIENS—FORECLOSURE—DEFENSES—PLEADING—SUPPLEMENTAL ANSWER SHOWING PAYMENTS—STIPULATION FOR CREDITS PRIOR TO ENTRY OF JUDGMENT—WAIVER. In an action to foreclose mechanics' liens, where the parties agreed in writing that judgment be postponed and that payments made should be credited on the liens before the entry of judgment, it is error, on plaintiff's motion for judgment, to refuse the defendants leave to file a supplemental answer showing payments made since the commencement of the action which had not been credited; and the original answer admitting the amount due on the liens did not waive the enforcement of the contract.

SAME—CREDITING NOTE ASSIGNED AS COLLATERAL. In such a case, the defendants are not entitled to have a note, assigned as collateral security, credited on the liens, without a showing that the note had been paid or converted to the plaintiff's use.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 3, 1903, in favor of the plaintiff, upon the pleadings and a stipulation, after refusing leave to file a supplemental answer, in an action to foreclose a mechanics' lien. Reversed.

F. C. Park and *H. D. Moore*, for appellants, upon the point that the filing of the supplemental answer was a matter of right, cited: *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Wade v. Gould*, 8 Okl. 690, 59 Pac. 11; *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; *Peterson v. Albach*, 51 Kan. 150, 32 Pac. 917; *McDonald v. McDonald*, 34 Wash. 293, 75 Pac. 865; *Brooks*

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v. Moody, 25 Ark. 452; *Meacham Arms Co. v. Swarts*, 2 Wash. T. 412, 7 Pac. 859; *Fleischner v. First Nat. Bank*, 36 Ore. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; *Seehorn v. Big Meadows etc. Road Co.*, 60 Cal. 240; *Varriale v. Metropolitan St. R. Co.*, 66 N. Y. Supp. 559; *Harris v. Elliott*, 48 N. Y. Supp. 1020; *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *Hilliker v. Simpson*, 92 Me. 590, 43 Atl. 495; *New York v. East Bay Land etc. Co.*, 58 N. Y. Supp. 724; *Crane v. Lowe*, 59 Kan. 606, 54 Pac. 666; *Dennison v. Willcut*, 3 Idaho 793, 35 Pac. 908; *Williams v. Moorehead*, 33 Kan. 609, 7 Pac. 226.

William B. Allison and *Scott Calhoun*, for respondent, contended, among other things, that it was discretionary to refuse leave to file the supplemental answer. 21 Ency. Plead. & Prac., 20, 43, 73; *Harrington v. Slade*, 22 Barb. 161. The defense was waived. 2 Ency. Plead. & Prac., 173; *Nisbet v. Lawson*, 1 Kelly (Ga.) 275; *Thompson v. Perkins*, 57 Me. 290; *Hughes v. Feeter*, 23 Iowa 547; *Miller v. Macklot*, 13 Ind. 217.

FULLERTON, J.—On February 27, 1903, one Williams, as plaintiff, began an action in the superior court of King county, against D'Arcy Kirk and Emma Kirk, his wife, Albert M. Ewing and Lottie Ewing, his wife, and Olaf Olson, as defendants, to foreclose certain mechanics' liens on a leasehold interest, held by D'Arcy Kirk and Albert M. Ewing, in lot 12, of block "G," of A. A. Denny's addition to the city of Seattle. In his complaint the plaintiff alleged that there was a balance due him from Kirk and Ewing in the sum of \$3,389.50, and that for such sum the liens set forth in his complaint were liens on the property above described, superior to the claims and interests of the defendants and each of them.

Immediately after the action had been commenced, the

plaintiff entered into a written agreement with the defendants Kirk and Ewing, by the terms of which he agreed to take no further action in the case until November 1, 1903. And in consideration of the delay on the part of the plaintiff, the defendants Kirk and Ewing agreed to turn over to the plaintiff all of the rentals, accruing and to accrue from the property between the date of the agreement and the date last named, to assign to him as further security a note and chattel mortgage held by them, of the face value \$1,120, and to file an answer to the complaint admitting their liability for the amount sued for therein. It was further agreed that all sums paid before November 1, 1903, either for rentals, from collections on the note, or from other sources, should be credited on the lien claims prior to the rendition of judgment, and, if sufficient amount should be paid to satisfy the claims, then the action should be dismissed. The defendants thereupon assigned to the plaintiff the note and mortgage mentioned, and filed an answer to the complaint, admitting all of its allegations.

The matter rested in this condition until about August 20, 1903, when the plaintiff, Williams, sold and assigned all of his interests in the action, and the claims and demands mentioned therein, to Charles H. Burnett, Jr., who was thereupon substituted as the plaintiff. On November 2, 1903, Burnett moved for judgment on the pleadings, which motion was duly served on Kirk and Ewing, and noted on the motion calendar. Thereupon the defendants Ewing and wife applied to the court for leave to file a supplemental answer, tendering the answer along with the application, supporting it by an affidavit to the effect that the allegations therein contained were true. This answer, in substance, alleged that Burnett was not the real party in interest, but was the agent and trustee of the defendant Olaf Olson; that Olson had in fact purchased the liens, and that Burnett was holding them for his use and benefit; that Olson and the answering defendants held the leasehold in-

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terest on which the liens were sought to be foreclosed, as tenants in common, and that they, as tenants in common with Olson, claimed the benefit of the purchase of the outstanding incumbrances on the common property. Further answering, they alleged that they had paid on the claims, since filing their original answer, the sum of \$204.60, and had turned over to the plaintiff a note and mortgage for \$1,120, no part of which had been credited upon the indebtedness represented by the liens. They prayed that the action be dismissed on the first defense interposed, or, in the alternative, that they have credit for the amount paid and the amount of the note, as set out in the further defenses.

The court refused to permit the answer to be filed, and entered judgment finding that the defendants were indebted to the plaintiff for the full amount stated to be due in the liens, and decreeing that the liens be foreclosed, and that the interests of all the defendants, except Olaf Olson, be sold to satisfy the amount found due thereon. The defendants Ewing and wife appeal from the judgment.

The respondent first objects that the appellants are not entitled to be heard to question the order of the court refusing to permit them to file their supplemental answer, because they did not except to the order. But the order was one embodied in a written order and journal entry in the cause, and was a self-excepting order, under Bal. Code, § 5051. No formal exception was necessary to make the order reviewable in this court.

It is next urged that the answer itself is incomplete and insufficient, in that it does not set out with particularity and fullness the matters sought to be alleged. But this is not a reason for denying the appellants the right to answer at all. Doubtless, if the answer did not conform to the rules of good pleading, it would have been proper for the respondent to have moved against it after it was filed in the cause, but inasmuch as it contained the substance of a

good defense, to show that the defense was defectively stated was not a sufficient reason for refusing to permit it to be filed.

It is said, however, that the answer does not even contain the substance of a good defense. We think it does. If it be true that Olson is a tenant in common with the appellants, in the ownership of the leasehold interest, he cannot buy up the outstanding incumbrances on that interest and foreclose them against his cotenant; at least, not without some allegation showing that his cotenant is liable for the whole amount of such incumbrances and that he is not liable for any part of the same. No such showing appeared here. So far as the record discloses Olson's interests in the common property were subject to these liens. True, counsel in their brief have made a case for him, but we find in the record no support for the case made in the brief.

But, if there were no merit in this branch of the case, the second defense stated in the answer required that the court permit it to be filed. It was there alleged that a part payment had been made on the amount due on the liens, which had not been credited thereon. By the express terms of the agreement entered into at the time the action was commenced, the appellants were entitled to have all sums so paid credited on the liens prior to the entry of judgment thereon, and the answers originally filed did not amount to a waiver of the right of the appellants to enforce this part of the agreement.

With regard to the note assigned as additional security, the appellants could have the amount thereof credited on the lien indebtedness only in case the note had been paid, or the assignee had converted it to his own use. The answer does not make it clear whether either of these conditions had occurred at the time the answer was tendered, and is defective in that respect. However, it can be corrected, if moved against, after leave to file is granted.

The judgment appealed from is reversed, and the cause

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remanded, with instructions to grant the application of the appellants to file a supplemental answer.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5166. Decided May 13, 1905.)

J. E. GRISSOM, *Respondent*, v. W. D. HOFIUS, *Appellant*.¹

ANIMALS — VICIOUS DOG — PARTNERSHIP — PLEADING AND PROOF — VARIANCE—OWNERSHIP OF DOG—PARTNERS OF DEFENDANT NOT JOINED. In an action for personal injuries sustained through the bite of a vicious dog, it is not a variance that the complaint alleged that the dog belonged to the defendant and the proof showed that it was owned by a copartnership of which the defendant was a member; since the defendant was not misled nor prejudiced by the allegation that he owned the dog, and each partner is liable for the torts of the copartnership.

PARTIES — DEFECT — PARTNERSHIP — COPARTNERS NOT JOINED IN ACTION OF TORT—WAIVER. One partner, sued for the torts of the copartnership, cannot take advantage of any defect in parties defendant, where the objection was not raised by demurrer or answer.

ANIMALS—VICIOUS DOG—SCIENTER—KNOWLEDGE OF KEEPER—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through the bite of a vicious dog, there is sufficient evidence of the defendant's knowledge of vicious propensity, where it appears that the dog had previously bitten two other persons in the presence of defendant's watchman, who was the dog's keeper, and who on prior occasions had prevented the dog from attacking others, and that he was kept about the premises as a watch dog, although the defendant and the watchman denied any knowledge of vicious propensity; since the watchman's notice of the dog's disposition was sufficient and was notice to the defendant.

SAME—DAMAGES FOR PERSONAL INJURIES—WHEN NOT EXCESSIVE. In an action for personal injuries sustained through the bite of a vicious dog, a judgment for \$3,000 will not be reversed as excessive, where the plaintiff was confined to his bed for seven weeks, and suffered much pain, and at the trial, three months after the injury, his leg was stiff and the wound still a running sore, and where the jury returned a verdict for \$4,000, which was reduced by the trial judge.

¹ Reported in 80 Pac. 1002.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 28, 1903, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained through the bite of a vicious dog. Affirmed.

Ballinger, Ronald & Battle, for appellant, contended, among other things, that there was a fatal variance. *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578; *Memphis etc. R. Co. v. Chastine*, 54 Miss. 503; 2 Thompson, Trials, § 2251; *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830. A partner is not liable for the torts of his copartner, unless authorized or ratified, or done within the proper scope of the business. Story, Partnership, § 168; *Graham v. Meyer*, Fed. Cas. No. 5,673; 1 Lindley, Partnership, p. 147 and note; Collier, Partnership (Perkins ed.), § 457; *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Durant v. Rogers*, 71 Ill. 121; *Marks v. Hastings*, 101 Ala. 165, 13 South. 297; *Taylor v. Jones*, 42 N. H. 25. Hofius would have the right to contribution from his firm. 7 Am. & Eng. Ency. Law (2d ed.), 364-366; *Smith v. Ayrault*, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; *Ankeny v. Moffet*, 37 Minn. 109, 33 N. W. 320; *Johnson v. Torpy*, 35 Neb. 604, 53 N. W. 575, 37 Am. St. 447.

Brady & Gay, for respondent.

MOUNT, C. J.—Action for personal injuries caused by the bite of a vicious dog. Plaintiff recovered judgment below, and defendant appeals.

The complaint alleges, in substance, that, on and prior to July 19, 1903, the defendant, W. D. Hofius, was the owner of a bulldog, known to him to be vicious, dangerous, and ferocious; that said Hofius kept said dog on premises

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claimed by him, on the tide flats, in the city of Seattle; that across said premises there was a right of way, commonly used by the public generally, with the knowledge and consent of said defendant; that on the 19th day of July, 1903, while plaintiff was lawfully on said right of way going to his regular work, said dog, without any cause therefor, "ferociously, viciously, and maliciously bit and lacerated the plaintiff's left leg, causing the plaintiff great pain, suffering," etc. The defendant answered the complaint by a general denial, and pleaded affirmatively that the plaintiff was a trespasser on said premises at the time of said injury, and that plaintiff's injury was the result of his own negligence and fault. The reply of plaintiff denied the affirmative allegations of the answer. On these issues the case was tried to the court and a jury, which returned a verdict in favor of plaintiff for \$4,000. Upon motion, this verdict was reduced to \$3,000, which plaintiff elected to take, and a judgment was entered for that amount.

Appellant argues, first, that the proof shows a fatal variance from the allegations of the complaint. The complaint alleges, in substance, that the dog which bit and injured the plaintiff was owned and kept by the defendant, W. D. Hofius. The evidence of the plaintiff and his witnesses was to the effect that the dog was kept by a watchman on premises owned by defendant Hofius, and that defendant admitted that he was the owner of the dog. The evidence of the defendant shows that the dog was owned by "W. D. Hofius & Co.," a copartnership composed of W. D. Hofius and others. Toward the close of defendant's evidence, and after it had been shown that the dog was purchased by funds of the said copartnership, plaintiff's counsel announced that they would admit that the dog belonged to said copartnership at the time of the injury to plaintiff. Appellant then moved the court for a nonsuit upon the ground of a fatal variance, and that the evidence showed a defect of parties.

This motion was denied by the court. The statute upon the question of variance is as follows:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Bal. Code, § 4949.

There is no claim, and none can be made, in this case, that the variance actually misled the defendant to his prejudice in maintaining his defense, because defendant well knew, both before and after he filed his answer, that the dog belonged to the copartnership of which he was a member, and not to himself personally. He was, therefore, not misled as to the ownership of the dog. But, if he was misled by the allegation that the dog belonged to him personally and was maintained by him, he was not prejudiced thereby, because the rule is settled that each partner is liable for the torts of the copartnership, and an injured party may sue all the partners, or any one of them. Lindley, Partnership, § 147; 15 Ency. Plead. & Prac., 877, and cases cited. It follows that, if plaintiff had alleged that the dog was the property of, and maintained by, the partnership of W. D. Hofius & Co., the defendant Hofius would still be liable under the facts shown. Appellant cannot now take advantage of the fact that there was a defect of parties. The ownership of the dog was well known to the appellant. The question was not raised by either demurrer or answer, and therefore was waived. Bal. Code, § 4911; *Criswell v. School District*, 34 Wash. 420, 75 Pac. 984.

Appellant next contends that the verdict is contrary to the evidence, because it was not shown that defendant, or any member of the copartnership, or the watchman who was keeper of the dog, had any knowledge of the vicious character of the dog prior to the time of the injury complained of. It is true that all these witnesses testified that they did not know the dog was vicious prior to that time, but several

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of the plaintiff's witnesses testified to the vicious character of the dog, and that he had bitten at least two other persons prior to that time, in the presence of the watchman, and that the watchman had, on other prior occasions, prevented the dog from biting others who were attacked without cause. It was also shown that the dog was procured and kept upon the premises with the watchman as a watchdog. In the case of *Robinson v. Marino*, 3 Wash. 434, 28 Pac. 752, 28 Am. St. 50, this court said:

"The owner of a domestic animal is not liable, in the absence of statutory provision, for any injury it may inflict upon others, unless he has notice of its inclination to commit such an injury. But, according to the more modern and more reasonable doctrine, it is not necessary that he should have had actual positive notice. If he has notice that the disposition of the animal is such that it would be likely to commit an injury similar to the one complained of, it is sufficient. It is not necessary that the notice be of injury actually committed. Thus, in the case of a dog known to be vicious and ferocious by its keeper, it is unnecessary to show that he had previously bitten any person. The keeper of such a dog must see to it that he is kept securely, or be responsible for all injury done by him. . . . In *Muller v. McKesson*, 73 N. Y. 195, it was held that in an action against the owner of a ferocious dog for injuries inflicted by it, proof that the animal is of a savage and ferocious disposition is equivalent to express notice. And it has even been held that the knowledge of the wife is the knowledge of the husband in such cases. 2 Shearman and Redfield on Negligence, § 630, note."

And, also, that knowledge of the keeper is knowledge of the master. *Corliss v. Smith*, 53 Vt. 532; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. 454; *Hahnke v. Friederich*, 140 N. Y. 224, 35 N. E. 487. Under the rule as laid down in the cases above cited, there was sufficient evidence to go to the jury as to whether or not the defendant knew, or should have known, the vicious disposition of the dog, and the verdict of the jury is conclusive of the question.

Appellant next contends that the judgment for \$3,000 is excessive. The evidence shows, that the bite caused a very severe wound at the knee of the left leg; that, soon after the wound was inflicted, blood poisoning set in, the leg turned black, and was much swollen. Respondent was confined to his bed for seven weeks, under the care of a physician and nurses. He suffered much pain. He testified that during that time he suffered much fear that hydrophobia would result from the wound. At the time of the trial, which occurred some three months after the date of the injury, the wound was still a running sore, and plaintiff's leg was stiff, and his surgeon testified that the leg might remain stiff permanently, but that it would probably become normal in time. Taking all these things into consideration—also, the fact that the jury returned a verdict for a larger amount, and that the trial judge who saw the condition of the respondent fixed the amount of the recovery at \$3,000, we are not disposed to disturb the judgment as being excessive.

Appellant contends lastly that the instructions given by the court to the jury were erroneous, because the case was not submitted upon the theory that, if the appellant was liable at all, he was liable only as joint wrongdoer. But we have already held above that this question was waived by the appellant. It is unnecessary to discuss it further. We have examined all of the instructions given in the case, and find that they fairly presented the law of the case to the jury.

There is no error in the record, and the judgment appealed from is therefore affirmed.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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(No. 5196. Decided May 15, 1905.)

ROBERT MUIR, *Respondent*, v. CITIZENS NATIONAL BANK
OF FAIRHAVEN, *Appellant*.¹

BANKS AND BANKING—NATIONAL BANK IN PROCESS OF LIQUIDATION—SUBSEQUENT TRANSFER OF STOCK—ENTRY ON BOOKS. A national bank, in process of voluntary liquidation, cannot be compelled to enter subsequent transfers of stock on its books and issue new certificates thereof; since, under U. S. Rev. Stats., § 5220, its business is closed for all purposes except winding up its affairs, and a transferee of its stock is merely an equitable owner of an interest in the assets.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered January 25, 1904, upon sustaining a demurrer to an answer, granting a mandatory injunction as prayed for in the complaint. Reversed.

Kerr, McCord & Craven and *Fairchild & Bruce*, for appellant.

Marshall P. Stafford, for respondent.

MOUNT, C. J.—This action was brought for the purpose of obtaining an order against the defendant, requiring it to transfer to plaintiff six shares of its stock on the books of the corporation, and to issue to plaintiff, in his own name, a certificate therefor, in lieu of a certificate purchased from a former stockholder of record. The defendant appeared in the action, and filed a motion to strike certain words and make a more specific statement of some of the allegations of the complaint. These motions were denied, and thereupon a demurrer to the complaint was filed, which was also denied. Defendant thereupon filed an answer, denying certain allegations in the complaint, and alleging as an affirmative defense, in substance, that the defendant, since January 10, 1900, has been a national banking corporation, existing under the laws of the United States; that, prior to the commence-

¹ Reported in 80 Pac. 1007.

ment of this action, defendant, being solvent, went into voluntary liquidation, under the provisions of U. S. Rev. Stats., §§ 5220, 5221. The plaintiff demurred to this answer, and the demurrer was sustained. The defendant declined to plead further, and a judgment was entered as prayed for in the complaint. The defendant appeals.

The motions to strike and make more definite are of no particular moment in the case, and we shall not notice them further, but will pass to the main question, which is: May a national bank, in process of voluntary liquidation, be compelled to make transfers of stock on its books, and issue certificates thereof to new subscribers? For a better understanding of the question, we may state that the pleadings show that the appellant was organized as a national bank on January 10, 1900. On the 7th day of August, 1901, at a meeting of the stockholders, at which meeting the whole stock of the bank was represented, it was resolved, by a vote of all the stock, that the corporation be placed in voluntary liquidation, to take effect August 26, 1901, under the provisions of U. S. Rev. Stats., § 5220 *et seq.* The proceedings were thereupon certified and reported to the comptroller of the currency of the United States. Thereafter, on the 11th day of August, 1903, respondent purchased from one of the stockholders six shares of the capital stock of said corporation, and received a certificate therefor, duly indorsed. Said certificate was thereupon presented to the cashier of said bank for transfer upon the books of the corporation. Such transfer was refused. It is admitted, also, that the corporation is solvent, and that the six shares are worth at least \$300.

It has frequently been held that a national bank in voluntary liquidation is not thereby dissolved as a corporation, but may sue and be sued, by name, for the purpose of winding up its business. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840; *Chemical Nat. Bank v. Hart-*

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ford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439, 40 L. Ed. 595. The decisions go no further than to hold that the corporation continues for the purpose of *liquidation and winding up its business*. No decision has been called to our attention, and after careful search we have found none, which holds that the stock of a corporation in liquidation, either voluntary or involuntary, may be the subject of traffic and transfer from one to another, upon the books of a corporation, after it ceases to do business in the usual way.

On the other hand the United States statute, Rev. Stats. § 5220, referring to national banks, provides: "Any association may go into liquidation and be closed by a vote of its stockholders owning two-thirds of its stock." The words "and be closed," seem to indicate a conclusion of its business as a going concern. Thereafter it may transact only such business as is necessary or proper in the settlement and winding up of its affairs. The corporation, of course, continues under the decisions above cited for such purpose, but for such purpose only. The closing of the business of the corporation for the purposes for which it was organized, while not a dissolution of the corporation, is in substance a dissolution of its powers to transact new business. The only power left to it is the power to collect its dues and pay its debts, and to distribute, ratably among its stockholders, the balance after the debts are paid. The rights and liabilities of the stockholders of the bank are fixed at the date when the bank goes into liquidation, and a stockholder may not thereafter transfer his stock and avoid liability thereon. *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. Ed. 386; *Schrader v. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. Ed. 564; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. 308; *Crease v. Babcock*, 23 Pick. 334, 34 Am. Dec. 61.

If the power of the bank, after voluntary liquidation begins, is limited to final settlement and winding up of its affairs, it seems to follow that no new stock may be issued pending such settlement. The act of issuing new stock, or

new and original certificates of stock, would, upon its face, seem to contradict the fact that the corporation was in process of liquidation or of dissolution, and would indicate that the corporation was an active going concern. The policy of the statute is certainly opposed to the issuance of new certificates of stock pending the dissolution of the corporation, or of any act which would belie the true condition of the corporation, and which is not necessary or proper in the final settlement and winding up of the affairs of the corporation. A stockholder may, no doubt, transfer and sell his stock in a banking corporation in process of liquidation, and the purchaser may acquire all the rights of such stockholder in and to the assets of the corporation. It is said: “. . . an assignment or transfer of stock by a stockholder after the dissolution of the corporation is merely an equitable assignment of his interest in the assets of the concern as it may appear upon the settlement.” Cook, Corporations (5th ed.), § 641; *James v. Woodruff*, 10 Paige 541; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781. The last case cited above is in point upon the facts in this case, and holds in accord with the claim of appellant. It was there said:

“The reasons for making the stock, as such, transferable, and allowing the purchaser by virtue of his purchase to become a member of the corporation, cease to exist when there is no profit to be made, no business to be done, and when the property of the bank and its liabilities are fixed, and nothing remains but the adjustment of these. Whether the liquidation of the affairs of the bank be voluntary or involuntary, or whether it proceeds under the authority given to continue the bank in existence in order to close its affairs, it is necessarily implied that the respective rights, not only of the creditors and debtors of the bank, but of the stockholders, are to be determined as of the time when it commences. Indeed, were the stock, as such, to continue transferable, serious embarrassments would arise. Where stock is sold in the ordinary course of business, and so transferred,

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it is not important to the purchaser whether the bank has or has not claims against the stockholder so transferring stock. But when the bank is in liquidation, and when all to which the stockholder is entitled is his proportion of the assets, the claims which the bank may hold against him are a proper offset to those which he may hold against it by virtue of his ownership of stock. He cannot, therefore, place another in the position of a stockholder, even if he may invest him with such rights which he himself equitably may have. . . . When a bank is in liquidation, the liability of the stockholder for the debts of the corporation has been fixed. If there is a debt due from the bank, he cannot transfer to any one else his liability to pay that debt, so as to affect the creditor or subject him, in seeking such remedies as he may have against the stockholders, to any examination beyond the list of those who were so when the liquidation commenced. No further debts can be contracted thereafter, nor any transaction made except such as may result by implication from the duty of closing up its affairs. While the embarrassments that would arise from holding the stock of a bank transferable after it has once gone into liquidation are manifest, no reason incidental thereto exists why such stock should continue transferable."

While the respondent in this case is the equitable owner of the fund which will result to the stock after the final settlement of the affairs of the bank, and while he has such rights as an equitable owner may have in the management of the trust, yet we think he has no right to be registered as a stockholder in the corporation and have a new certificate of stock issued to him. The notice which was given to the cashier or liquidating agent, by presenting the six shares properly indorsed, is, no doubt, sufficient to put the corporation on notice that respondent is entitled to his distributive share of the trust funds to be disbursed to the stockholders when final settlement is made, and would, if the bank were a going concern, entitle him to be registered as a stockholder and receive a certificate to that effect. But when the bank pleads that it is in process of liquidation under the law, this is a defense to a demand for a certifi-

cate of stock. It was therefore error to sustain the demurrer to the affirmative answer.

The order appealed from is reversed, and the cause remanded for further proceedings in accordance with this opinion.

DUNBAR, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5248. Decided May 15, 1905.)

RALPH W. BROOKS, *Respondent*, v. McCABE & HAMILTON,
INCORPORATED, *Appellant*.¹

TRIAL—OPENING STATEMENT OF COUNSEL—WHEN GROUND FOR DISMISSAL. A judgment for defendant on the merits, based upon the plaintiff's opening statement to the jury, is justified only when facts are admitted from which it affirmatively appears that there is no cause of action or that there is a complete defense, and the omission to state a case fully is not ground for such a judgment.

APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. A judgment in an action for personal injuries, tried to the court without a jury, will not be reversed upon questions of fact upon which there is conflict in the evidence, where the evidence is sufficient to sustain the findings of the trial judge.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 12, 1904, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for personal injuries sustained by a stevedore while storing grain in the hold of a ship. Affirmed.

Richard Saxe Jones, for appellant.

McCafferty & Kane, for respondent.

MOUNT, C. J.—Action for personal injuries. Plaintiff obtained a judgment for \$450 in the court below. Defendant

¹ Reported in 80 Pac. 1004.

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appeals. The cause was tried to the court without a jury. The facts are substantially as follows: On the 14th day of November, 1902, respondent was in the employ of appellant, storing away grain in the hold of a steamship. Respondent had worked at this kind of work for several months. He had been employed at this job for four or five days. It was his duty, with other employees, to receive bags of grain on a table, in the hold of the ship. The bags were delivered upon the table by means of a chute, about thirty feet long, extending from the table to the hatchway above. The chute consisted of two sections. The upper or main section was known as the "main" chute, and the other as the "tongue" chute. The upper end of the main chute was attached to the coamings of the hatch, and this chute extended downward into the hold of the vessel. The lower end of the main chute fitted into the upper end of the tongue chute. At this junction, the two chutes were placed upon a bar of wood or scantling, suspended horizontally by means of ropes attached to each end of the bar, and fastened securely to the coamings of the hatch above. The tongue chute extended on down to the table, on which the lower end rested. Bags of grain, weighing from one hundred and twenty to one hundred and thirty pounds each, were placed in the chute from the deck of the vessel, and were slid down upon the table in the hold, where respondent and other employees received the bags and stored them away. On the date named, a bag of grain, on its way down the chute, jumped therefrom and struck the respondent, injuring his leg.

The complaint alleged, and the court found, that the appellant was negligent in permitting the chute to become and remain in a defective condition, after its foreman had had notice thereof; that one end of the horizontal bar supporting the main chute and tongue chute, at the junction thereof, was lower than the other end; and it is claimed that, by reason of this defect, the bag which injured respondent was thrown from the chute. It is also claimed that

respondent did not know of the defect, and that it was not apparent; that the duty of the foreman was to keep it in repair.

When the cause came on for trial, and after counsel for respondent had made the opening statement to the court, the appellant objected to any evidence, for the reason that the complaint failed to state a cause of action, and that the opening statement "shows that there is nothing here for the court to try." These objections were denied. This court has held that a demurrer of this kind will be treated as an attack upon the complaint after verdict, and that every reasonable intendment and legitimate inference susceptible of being drawn from the facts stated will be applied in aid of the complaint. *Prescott v. Puget Sound Bridge etc. Co.*, 31 Wash. 177, 71 Pac. 772. Tested by this rule, the complaint was sufficient. It is unnecessary to set it out here. In the case of *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 79 Pac. 308, in speaking to the question of the statement of counsel, we said:

"Counsel may state their case as briefly or as generally as they see fit, and it is only when such statement shows affirmatively that there is no cause of action, or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are the only facts which the party expects or intends to prove, that the court is warranted in acting upon it."

The statement made by counsel in this case was not such as to bring it within the rule above quoted so as to warrant the court in dismissing the action. The objections were properly denied.

Upon the merits of the case, appellant argues, that respondent assumed the risk; that the evidence shows no negligence on the part of the appellant; that, if the appliances were in a defective condition, the fact was due solely to the negligence of a fellow servant; and that the injury was caused by a pure accident. All these are questions of fact

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upon which there is conflict in the evidence. After a careful examination of the record, we are of the opinion that the evidence is sufficient to sustain the conclusions of the trial judge.

The judgment is therefore affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5291. Decided May 16, 1905.)

THE STATE OF WASHINGTON, *on the Relation of F. B. Hawes,*
Appellant, v. FRANK BREWER, *Sheriff etc., et al.,*
*Respondents.*¹

MANDAMUS—PLEADING—DEMURRER—PRACTICE. Common law forms of pleading being abolished, sustaining a demurrer to a writ or affidavit in mandamus is permissible, being in effect the quashing of the writ.

MANDAMUS—TO COMPEL PROSECUTION OF CRIMES—SUNDAY LAWS—ENFORCEMENT—NEGLECT OF DUTY A MISDEMEANOR. Mandamus will not lie to compel peace officers to prosecute all persons violating the laws respecting the keeping of places of business open and selling goods and liquors, etc., on Sunday, since no specific thing is pointed out to be done, and mandamus does not lie to compel a general course of official conduct, and since Bal. Code, § 7252, provides a specific remedy by making neglect of such official duty a misdemeanor.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered June 11, 1904, upon sustaining a demurrer to the complaint, dismissing an application for a writ of mandate. Affirmed.

E. C. Dailey and *Frank D. Lewis*, for appellant.

R. A. Hulbert, Hathaway & Alston, and *Bell & Austin*, for respondents.

¹Reported in 80 Pac. 1001.

DUNBAR, J.—This is an action in mandamus, brought in the superior court of Snohomish county, wherein the state of Washington, on the relation of F. B. Hawes, is plaintiff, and Frank Brewer, sheriff of Snohomish county, and Edward J. Dwyer, marshal of the city of Everett, Washington, are defendants. The affidavit of relator alleges, that it is the duty of said officers, under and by virtue of their oath of office, and of the laws of the state of Washington, to enforce the laws of said state, and make complaint against and prosecute all persons who violate the laws of said state against keeping saloons, cigar stands, and other places of business open for the purpose of trade or sale of goods on the first day of the week commonly called Sunday, or who sell or dispose of any intoxicating liquor on Sunday, as aforesaid, or who rent houses for the purpose of prostitution or who gamble or run gambling houses; and, in fact, to complain of and prosecute persons who commit offenses against the criminal laws of the said state of Washington. It alleged that said laws have been, for a long time past, openly and notoriously violated in said city, in that saloons, cigar stands, etc., have been kept open on Sunday for the purpose of trade, and that houses are being, and have been, rented in said city for the purpose of prostitution, and that gambling with slot machines has been carried on, and at length reciting the perpetration of the crimes and misdemeanors committed in the city; that demand had been made upon defendants to enforce the laws of said state against the violators thereof; that said defendants, and each of them, have utterly failed, neglected, and refused to enforce said laws, or any of them. This is the substance of the affidavit. And the demand was made that an alternative writ of mandamus issue to said defendants, requiring them to enforce said laws, and prosecute all persons guilty of the violation thereof, or to show cause to the court why they neglected and failed so to do.

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A peremptory writ was issued, and upon the hearing a demurrer was interposed to the complaint: first, that the court had no jurisdiction of the subject-matter of said action; second, that the plaintiff had no legal capacity to sue; third, that there was a defect of parties plaintiff and defendant; fourth, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer being sustained, judgment was entered, and from such judgment this appeal was taken.

It is insisted by the appellant, first, that the court erred in sustaining the demurrer and in dismissing the action, because there is no provision for a demurrer to the writ or affidavit in mandamus. We think there is no merit in this contention. The common law forms of pleading have been abolished by the code, and the demurrer in this instance was in effect a motion to quash the writ, and the sustaining of the demurrer was in effect the quashing of the writ. The view we take of the merits of the case renders it unnecessary to pass upon the proposition that the defendants could not be joined in the same action, as we think there is no cause of action stated in the affidavit.

The office of mandamus is to compel an officer to perform a ministerial duty, and the writ cannot be used for the purpose of compelling the performance of a duty which requires the exercise of discretion. It is insisted by the respondent that this question cannot be considered in this case, for the reason that the demurrer admits all the facts stated in the complaint, and that it was stated that the commission of crime was open and notorious. The allegations of the complaint are admitted for the purpose of raising the questions of law which are to be determined on the demurrer in this case; namely, that the respondents held certain official positions and that the suit was brought to compel them to commence actions, and that it seeks to compel a general course of official conduct, which the courts are not authorized to do. Mandamus will not lie to compel a general

course of official conduct, as it is impossible for a court to oversee the performance of such duties. 13 Ency. Plead. & Prac., p. 497.

It will be seen, in this case, that the remedy sought was entirely too general to be at all practical. It is true that we decided in *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515, that mandamus would lie to compel a street railway company to resume the operation of a line which it had discontinued. But there was one specific thing which the street railway company was required to do which involved the entire controversy. But here there is a general course of official conduct sought to be compelled. There is no specific allegation of violation of duty in the petition. There is no statement of any commission of crime by any particular person, and we are unable to conceive to what effect an action for contempt could be prosecuted in case there was a refusal on the part of defendants to obey the injunction of the court. The alternative writ in this case is an instance of the inefficiency of such proceedings. The writ, after reciting the violation of the law, proceeded as follows:

"Now, therefore, being willing that justice be done in the premises, you and each of you are hereby commanded immediately to complain of and prosecute any and all persons violating any of the laws of the state of Washington, in said city of Everett, in manner and form hereinbefore described, and that thenceforth you and each of you perform each and every duty enjoined upon you by the laws of said state of Washington, in said city, or that you appear before the above entitled court at the court house in said city of Everett, Washington, on the 21st day of May, 1904, at ten o'clock in the forenoon of said day, and show cause, if any you can, why you refuse so to do."

The demand is for a continuing course of action. The writ cannot be any more specific than the petition, and the writ which must necessarily issue under a petition of this kind,

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and which was peremptorily issued, is no more effective than the statute. Each equally commands the officer to perform his duty. One is the announcement of the law by the law making power, the other is the announcement of the law by the court. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done. It is not adapted to cases calling for continuous action, varying according to circumstances. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile. 13 Ency. Plead. & Prac., p. 497, and cases cited.

Bal. Code, § 7252, provides that,

"Any public officer who shall refuse or wilfully neglect to inform against and prosecute offenders against the last preceding section [which is the section under which this action is brought] shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and the court before which such officer shall be tried shall declare the office or appointment held by such officer vacant for the remainder of his term."

Here is a specific remedy pointed out by the statute, and the remedy which must be resorted to by the citizen, in case of violation of duty by the officer.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5370. Decided May 19, 1905.)

GEORGE H. COX *et al.*, Respondents, v. LUCY TOMPKINSON
et al., Appellants.¹

DESCENT AND DISTRIBUTION—HOMESTEAD—DEATH OF WIFE PRIOR TO ISSUANCE OF PATENT—RIGHTS OF CHILDREN. Where a married man makes a homestead entry, and, upon the death of the wife before making final proof, a patent is issued in his name, the children, as heirs of the mother, acquire a one-half interest in the land.

ADVERSE POSSESSION—BY TENANT IN COMMON—NOTICE TO COTENANT—SUFFICIENCY—ESTOPPEL. The acts of a father are sufficient to imply hostility of title and to give publicity to his claim of ownership, so as to confer title to the homestead by adverse possession as against his daughter, where two years after the death of his wife in 1886, he made final proof and received a patent, and, believing himself to be the sole owner of the land, immediately thereafter dedicated streets and platted city lots, put them on the market, conveying by warranty deed, and maintained exclusive control over the property, and where the daughter stood by and saw valuable improvements made by the purchasers, and by the city in the streets, making no claim to the property, although receiving legal advice in 1891 as to her rights, until 1898, when she made deeds of her interest, but only for the purpose of clouding the title and compelling the owners to bring actions to quiet title; no verbal or written notice being necessary to start the running of the statutes against a tenant in common.

SAME—PAYMENT OF TAXES—PURCHASER AT MORTGAGE FORECLOSURE. Entry under a mortgage foreclosure sale is sufficiently adverse to start the running of the statute against one not a party to the suit, under Bal. Code, §§ 5503, 5504, conferring title by adverse possession upon the payment of taxes for seven years under claim of title made in good faith.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 23, 1904, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action to quiet title. Affirmed.

Bronaugh & Bronaugh, and *R. L. Edmiston*, for appellants. The father and daughter were tenants in common. *Hill*

¹ Reported in 80 Pac. 1005.

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Citations of Counsel.

r. Young, 7 Wash. 33, 34 Pac. 144; *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *Bjmerland v. Eley*, 15 Wash. 101, 45 Pac. 730; *Vermont Loan & Trust Co. v. Cardin*, 19 Wash. 304, 53 Pac. 164. Tenants in common will not be permitted to act in hostility to one another in reference to the joint estate. *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192; *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616; *Sorenson v. Davis*, 83 Iowa 405, 49 N. W. 1004; *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. 287, 39 Am. St. 678; *Phillips v. Wilmarth*, 98 Iowa 32, 66 N. W. 1053; *Boyd v. Boyd*, 176 Ill. 40, 51 N. E. 782, 68 Am. St. 169; Bal. Code, §§ 1736-1738; *Burgert v. Caroline*, 31 Wash. 62, 71 Pac. 724, 96 Am. St. 889. Time alone will not dissolve the relation. *Hawk v. Senseman*, 6 Serg. & R. 20; *Yarwood v. Johnson*, *supra*; *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. 34; *Mabie v. Whittaker*, *supra*. Mortgages or conveyances by one tenant will not dissolve the relation. *Leach v. Hall*, 95 Iowa 611, 64 N. W. 790; *Burns v. Byrne*, 45 Iowa 285; *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350; *Leach v. Beattie*, 33 Vt. 195; *Culver v. Rhodes*, 87 N. Y. 348; *Forward v. Dectz*, 32 Pa. St. 69; *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608; *Hudson v. Coe*, 79 Me. 83, 8 Atl. 249, 1 Am. St. 288. Nor will a sheriff's deed. *McMahill v. Torrence*, *supra*. The seven years' payment of taxes does not confer title unless possession is taken. *Paullin v. Hale*, 40 Ill. 274; *Whitney v. Stevens*, 77 Ill. 585; *Travers v. McElvain*, 200 Ill. 377, 65 N. E. 623; *Harding v. Butts*, 18 Ill. 502. Cox was not justifiably ignorant of opposing rights and his claim of title was not made in good faith. *Robson v. Osborn*, 13 Tex. 298; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95; *Litchfield v. Sewell*, 97 Iowa 247, 66 N. W. 104; *Lindt v. Uihlein*, 116 Iowa 48, 89 N. W. 214. It was the purchaser's duty to look beyond the record. *Sadler v.*

Niesz, 5 Wash. 182, 31 Pac. 630, 1030; *Bracka v. Fish*, 23 Wash. 646, 63 Pac. 561; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Mann v. Young*, 1 Wash. T. 454; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862. The seven year statute does not apply to tenants in common. *Cooter v. Dearborn*, 115 Ill. 509, 4 N. E. 388. The following is a parallel case: *McMahill v. Torrence*, *supra*.

Crow & Williams, for respondents, contended, among other things, that an ouster may be shown by any evidence tending to show a repudiation of the right of a cotenant. 1 Am. & Eng. Ency. Law (2d ed.), 804-806; *Ricard v. Williams*, 7 Wheat. 59; *Dubois v. Campau*, 28 Mich. 304; *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. 146, 9 Am. St. 177; *Miller v. Bledsoe*, 61 Mo. 96. The respondents had color of title under claim made in good faith. 1 Am. & Eng. Ency. Law (2d ed.), 869; *Simons v. Drake*, 179 Ill. 62, 53 N. E. 574; *Lee v. O'Quin*, 103 Ga. 355, 30 S. E. 356; *Wilson v. Atkinson*, 77 Cal. 485, 20 Pac. 66, 11 Am. St. 299; *Clapp v. Bromagham*, 9 Cowen 530; *Ware v. Barlow*, 81 Ga. 1, 6 S. E. 465; *Lee v. Ogden*, 83 Ga. 325, 10 S. E. 349; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327; *Rawson v. Fox*, 65 Ill. 200; *Smith v. Ferguson*, 91 Ill. 304; *Conner v. Goodman*, 104 Ill. 365; *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *Brooks v. Bruyn*, 35 Ill. 392.

FULLERTON, J.—This is an action to quiet title to certain lots and blocks in Muzzy's addition to the city of Spokane. The facts shown by the record are, in substance, these: On November 15, 1880, one Hirman Muzzy made a homestead entry on a certain quarter section of land, situate near the city of Spokane, and, together with his family, consisting of his wife and five children, took up his residence thereon. On January 6, 1886, Mrs. Muzzy died, leaving as one of the heirs at law the appellant Lucy Tompkinson. In the early part of the year following, Muzzy made final

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proofs on his homestead, and on June 2, 1887, received his final receiver's receipt therefor. Patent was issued on May 26, 1888. Immediately after receiving his final receiver's receipt, Muzzy platted a considerable portion of the property into streets, alleys, lots, and blocks, under the designation of "Muzzy's Addition to Spokane Falls;" and, after dedicating in writing to the public use forever the streets and alleys shown thereon, caused the same to be filed, as provided for by law. On August 8, 1892, Muzzy, in consideration of the sum of \$5,000, then loaned him by the respondent George H. Cox, executed and delivered to Cox a mortgage on the lots and blocks in question in this action, the same being a part of the addition, so platted as above stated, to secure the repayment of the loan. Muzzy thereafter defaulted in the payments provided for in the mortgage, and the same was foreclosed, and the property sold on February 6, 1894. The respondents purchased the property at the sale, receiving a certificate of sale at that time and a sheriff's deed on February 7, 1895. Immediately after the sale the respondents entered into possession of the property, and, from that time down to the commencement of this action, have maintained such possession to the exclusion of every one else, and have paid all the taxes that were lawfully levied and assessed thereon as the same matured—a period of more than seven years.

After the death of his wife, Muzzy believed himself to be the owner in fee of the homestead property. He at once assumed sole and exclusive dominion and control over it, put such of it as he had platted into lots and blocks on the market for sale, and has sold many of the lots to persons who purchased them for residence and business purposes, giving warranty deeds to such purchasers. In short, the evidence shows that Muzzy not only claimed to be the sole owner in fee of the property, but has exercised such rights over it as one usually exercises over his own. Of the lots sold, many of them were improved by the pur-

chasers by the erection of costly and permanent buildings, and the streets shown on the plat were at once assumed by the people and city authorities of the city of Spokane to be public streets, and have been used by them ever since as such. The city also has improved the streets by grading them and constructing sidewalks thereon, and has laid, and permitted to be laid, water mains and gas pipes therein.

The appellant Lucy Tompkinson lived with her father on the homestead claim, after the death of her mother, until August, 1887, at which time she married and went to the home of her husband. Shortly thereafter she became estranged from her father, and no longer visited at his home, or permitted him to visit her. She has lived, however, ever since her marriage, either in the city of Spokane or within five miles therefrom, and knew that the homestead property was being disposed of by her father to persons who purchased on the faith of his title, and knew at all times of the improvements that were being made on the property. It was shown that, as early as 1891, she took the advice of counsel as to her interests in the property, but took no active steps to make known her claims until sometime in 1898, when she executed deeds to certain parts of the property to her co-appellants herein, which were filed and placed of record without delivery. It is conceded, however, that these deeds were not executed for the purpose of conveying such title as she claimed and possessed to the grantees named therein, but for the purpose of clouding the title, and compelling persons claiming through Muzzy to bring actions against her.

On the foregoing facts, the trial court held that the appellant Lucy Tompkinson, as heir to her mother, acquired title to an undivided one-tenth interest in the homestead property, on the issuance of the patent by the government to her father, but that she had been divested of such title by the operation of the statute of limitations, and was now estopped from asserting any interest therein. A decree was

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thereupon entered quieting in the respondents the title to the property described, from which decree she and her co-defendants appeal.

Under the rule announced by this court in the case of *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912, the appellant Tompkinson undoubtedly acquired, as heir to her mother, an undivided one-tenth interest in the land in dispute, on the acquisition of the legal title thereto by her father, so that the sole question to be determined here is, has she lost that interest by failing to assert it within the statute of limitations? It seems to us there can be but little question that she has. Her counsel do not deny that one tenant in common may hold the common property adversely to another, even though the cotenants bear the relationship of father and daughter, but they contend that possession by one cotenant does not become adverse to another until that other is definitely notified by the cotenant in possession that he disputes and disavows any claim of interest made by the other; and counsel argue that the facts fail to show that any such notification was given in this case. But we think counsel make too broad a statement of the rule.

As the possession of land, held by a common title by one tenant in common, does not imply hostility, as does possession by a stranger to the title, stronger evidence is required to show an adverse holding by a tenant in common than by a stranger, but the evidence need not differ in kind. Actual verbal or written notice is not necessary to start the statute running in such a case. If there be outward acts of exclusive ownership by the tenant in possession, of such a nature as to preclude the idea of a joint ownership, brought home to the cotenant, or of so open and public a character that a reasonable man would discover it, it is sufficient. 1 Cyc. 1071, *et seq.* The facts in the case before us we think show conclusively that the possession of Hiram Muzzy of

the homestead property was at all times adverse to the appellant. He not only had and maintained exclusive control and dominion over it as long as he retained the title, but his outward acts with reference thereto were inconsistent with any other idea than that of sole ownership. We think, too, they were of sufficient publicity and notoriety to put the appellant upon notice of his claim. It would be difficult to give more publicity to one's claim of ownership and title to real property than to plat the same into lots and blocks as an addition to a city, and sell and convey such lots by deeds of warranty.

But if the general statute of limitations could not be successfully pleaded, the respondents can claim title under sections 5503 and 5504 of the code. Their entry into possession under the title acquired at the foreclosure sale was sufficiently adverse to start the statute running. *Cain v. Furlow*, 47 Ga. 674. And their possession and payment of taxes for a period of seven years conferred title on them under the sections cited. *Philadelphia Mtg. & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501.

We conclude that the respondents have title to the property in question, and are entitled to have such title quieted in themselves.

The judgment appealed from will therefore stand affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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Statement of Case.

(No. 5338. Decided May 22, 1905.)

HERBERT L. WILLIAMS, *Respondent*, v. SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—PRESUMPTION FROM FACT OF COLLISION. There is a presumption of negligence upon the part of a railroad company from the fact that a passenger's injury was due to an unexplained disconnection of the coupler in switching cars on a side track, causing a collision; since evidence that the injury was due to the operation of the road makes out a *prima facie* case.

SAME—COLLISION—DISCONNECTION OF COUPLER—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. In an action for personal injuries sustained through the colliding of cars being switched on a side track with a postal car standing thereon, there is sufficient evidence of defendant's negligence, where it appears that the accident was due to the fact that the cars became detached from the switch engine, and that the coupling had come apart several times before, to the knowledge of the company's servants, who threw off safety chains simply for the purpose of expediting the business.

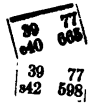
TRIAL—ARGUMENT OF COUNSEL—READING LAW TO JURY. It is not prejudicial error that counsel in argument to the jury was permitted to read from law books, when the same was in accord with the law given by the court to the jury, and the jury was not misled nor the party prejudiced thereby.

CARRIERS—DUTY TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS. In an action by a passenger against a railroad company for injuries sustained in a collision, it is proper to instruct that the railroad company owed the duty to carry the plaintiff safely so far as human care and skill would enable it to be done, and to use the utmost vigilance and exercise the highest degree of prudence and caution in running its trains so as to prevent injury; and a qualification respecting the practical operation of the business is not essential.

SAME—CUSTOM OF OTHER ROADS. In such a case the duty of the defendant is not measured by the degree of care customarily exercised by other roads.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered May 27, 1904, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a mail clerk in a collision. Affirmed.

¹ Reported in 80 Pac. 1100.



M. J. Gordon and *C. A. Murray*, for appellant, contended, among other things, that counsel should not be permitted to read to the jury from law books. *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141, 583; *People v. Anderson*, 44 Cal. 65; *Mullen v. Reinig*, 72 Wis. 388, 39 N. W. 861; *Steffenson v. Chicago etc. R. Co.*, 48 Minn. 285, 51 N. W. 610; *Baldwin's Appeal*, 44 Conn. 37; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. 51; *Sprague v. Craig*, 51 Ill. 288; *Ordway v. Haynes*, 50 N. H. 159; *Chicago v. McGiven*, 78 Ill. 347; *Porter v. Choen*, 60 Ind. 338; *Williams v. Brooklyn Elev. R. Co.*, 126 N. Y. 96, 26 N. E. 1048; *Scott v. Scott*, 124 Ind. 66, 24 N. E. 666; *Evansville v. Wilter*, 86 Ind. 414; *Cory v. Silcox*, 6 Ind. 39; Const., art 4, § 16. A carrier is bound to exercise only the highest degree of care consistent with the practical conduct of its business, and such as is customary under similar circumstances. *Johnson v. Seattle Electric Co.*, 35 Wash. 382, 77 Pac. 677; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204; 4 Elliott, Railroads, § 1585; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. 781; *Oviatt v. Dakota Cent. R. Co.*, 43 Minn. 300, 45 N. W. 436; *Louisville City R. Co. v. Weams*, 80 Ky. 420; *Arkansas etc. R. Co. v. Canman*, 52 Ark. 517, 13 S. W. 280.

Graves & Graves, for respondent, to the point that defendant owed plaintiff the legal duty of exercising the highest degree of care and diligence, cited: *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866; *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081; *Cogswell v. West St. R. Co.*, 5 Wash. 46, 31 Pac. 411; *Clukey v. Se-*

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attle Electric Co., 27 Wash. 70, 67 Pac. 379; *Cooley, Torts*, 768, 769; *Stokes v. Saltonstall*, 13 Pet. 181; *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378; *Laing v. Colder*, 8 Barr (Pa.) 479; *Philadelphia etc. R. Co. v. Anderson*, 96 Pa. St. 351; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Dertwort v. Loomer*, 21 Conn. 244; *Dirst v. Morris*, 14 How. 484; *Steamboat New World v. King*, 16 How. 469; *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; *Topeka City R. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. 754; *Ogilivie v. Washburn*, 4 Iowa 548; *Canfield v. Bates*, 13 Cal. 606; *Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Coddington v. Brooklyn Crosstown R. Co.*, 102 N. Y. 66, 5 N. E. 797; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333, 37 Am. Rep. 410; *Louisville etc. R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Louisville etc. R. Co. v. Retter's Adm'r*, 85 Ky. 368, 3 S. W. 591; *Southern R. Co. v. Watson*, 110 Ga. 681, 36 S. E. 209; *Hegeman v. Western R. Co.*, 13 N. Y. 1; *Caldwell v. New Jersey S. S. Co.*, 47 N. Y. 282; *New Jersey R. Co. v. Kennard*, 21 Pa. St. 203; *Reynolds v. Richmond etc. R. Co.*, 92 Va. 400, 23 S. E. 770; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. 175, 5 L. R. A. 498; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. 270, 38 Am. St. 753, 20 L. R. A. 316; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269; *Fox v. Philadelphia*, 208 Pa. St. 127, 57 Atl. 356, 65 L. R. A. 214. An injury resulting from an act in the operation of the train raises a presumption of negligence. The circumstances surrounding the accident, considered in connection with the legal duty the defendant owed plaintiff, make out a case of negligence under the doctrine of *res ipsa loquitur* which, unless rebutted by defendant to the satisfaction of the jury, render it liable to

plaintiff. 3 Thompson, Commentaries on the Law of Negligence, §§ 2757-2761, 2830; 2 Shearman & Red., Negligence, §§ 516, 517; 6 Cyc. 628-632; *Stokes v. Saltonstall*, *supra*; *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859; 3 Rose's Notes, U. S. Reports, pp. 812, 814; *Whitney v. New York R. Co.*, 102 Fed. 850; *Texas etc. R. Co. v. Gardner*, 114 Fed. 186; 9 Century Digest, cols. 1228-1234; *Rintoul v. New York Cent. R. Co.*, 17 Fed. 905; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *Rose v. Stephens etc. Transp. Co.*, 11 Fed. 438; *Peer v. Ryan*, 54 Mich. 224, 19 N. W. 961; *St. Louis etc. R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610; *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. 180; *Morris v. Strobel & Wilken Co.*, 30 N. Y. Supp. 571; *Reynolds v. Van Beuren*, 31 N. Y. Supp. 827; *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565. When a verdict which is clearly right is returned, error in giving or refusing instructions is harmless. *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119; *Hardin v. Mullen*, 16 Wash. 647, 48 Pac. 349; *Kirkland Land & Imp. Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224; *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Chicago etc. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; *Pierce v. Clavin*, 82 Fed. 550; *St. Louis etc. R. Co. v. O'Loughlin*, 49 Fed. 440; *Choctaw etc. R. Co. v. Holloway*, 114 Fed. 458; *Id.*, 191 U. S. 334, 24 Sup. Ct. 102; *Portland Gold Min. Co. v. Flaherty*, 111 Fed. 312; *Johnson v. Northern Pac. R. Co.*, 1 N. D. 354, 48 N. W. 227; *New York etc. R. Co. v. O'Leary*, 93 Fed. 737; *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277, 47 Am. St. 103; *Houston Elec.*

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St. R. Co. v. Elvis, 31 Tex. Civ. App. 280, 72 S. W. 216; *Chicago etc. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Chicago etc. R. Co. v. Murphy*, 198 Ill. 462, 64 N. E. 1011; *Beardstown v. Clark*, 104 Ill. App. 568; *Beard v. Skeldon*, 113 Ill. 584; *Richmond R. & Elec. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 53 Am. St. 839, 32 L. R. A. 220; *Atchinson etc. R. Co. v. Miller*, 39 Kan. 419, 18 Pac. 486; *Beauvais v. St. Louis*, 169 Mo. 500, 69 S. W. 1043; *Zellers v. Missouri Water & Light Co.*, 92 Mo. App. 107.

DUNBAR, J.—Appellant was a railway postal clerk in the service of the United States. On August 15, 1903, he was one of the clerks in charge of a postal car attached to a train of the appellant, running between Spokane and Northport. The car on which he was occupied was, pursuant to the usual custom, detached from the train at the latter point, and set in on a side track, to be returned to Spokane on the day following. Northport is a terminal point, and trains are made up at that point for other destinations. The siding upon which this postal car was placed was three hundred feet in length, and an even grade. A switch engine, engaged in making up a passenger train, entered upon this track with a baggage car and two coaches. For some cause, unknown and unexplained by the testimony, the coupler which connected the baggage car with the tender of the locomotive parted, and the three cars ran along the siding, and collided with the postal car, which contained the respondent, injuring him most seriously. This action was brought to recover damages for the injuries so sustained, and resulted in a verdict in respondent's favor. Motion for new trial was duly entered and overruled, and judgment rendered upon the verdict, from which judgment this appeal is taken.

It is conceded that the respondent was performing his duty on the car, and it is also conceded that the rules of

law applying to passengers on a railroad car apply to him. At the conclusion of the testimony for both respondent and appellant, the appellant requested the court to charge the jury to find for the defendant. This request was overruled, and upon the action of the court in this respect is based the first assignment of error, the contention being that there was no proof that there was any negligence on the part of the appellant; that there is no allegation that there was any defect in the construction of the cars, or in their equipment, or that they were in a defective or unsafe condition in any respect at the time of the happening of the accident; and that no legal presumption of negligence arose casting upon appellant the burden of disproving it.

The particular negligence alleged is that, while respondent was in the discharge of his duties in a postal car, on a siding at Northport, the appellant's servants and employees negligently ran and propelled against said mail car other cars, by means of a locomotive operated by it, and said mail car was struck by said cars, propelled with great force and violence, pushing it along for a distance, and derailing it, thereby throwing respondent down. The answer denied any negligence, and it is contended that there was no negligence shown. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808; and *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, are relied upon to sustain the appellant's contention.

In *Hawkins v. Front St. Cable R. Co.*, *supra*, this court held that the following instruction, "It is the law that where a passenger being carried on a train is injured without fault of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it," constituted reversible error as being too broad a statement of the responsibility of the carrier. There, it will be observed, the instruction overruled had no limitations whatever, and, under that instruction, if the passenger had been injured by some

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unavoidable accident disconnected entirely from the railroad company, such as an injury resulting from the discharge of a firearm by some one in the car, or through the window by some one outside of the car, the company would have been held responsible. So that it is not enough that the passenger is injured without fault of his own, but the injury must be connected in some way with the operation of the road; and, when the injury is so connected, we think, under the overwhelming weight of authority, that a *prima facie* case of negligence is made out by the plaintiff, and that the duty devolves upon the company to establish a want of negligence on its part. And the cases cited by this court in that case show that such was the view that the court took of the law.

There is nothing in the case of *Allen v. Northern Pac. R. Co.*, *supra*, to sustain appellant's contention. Mr. Thompson, in his Commentaries on the Law of Negligence, Vol. 3, § 2754, very happily expresses the distinction which we have sought to make. The section is as follows:

"In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof, in the first instance, is, of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim *res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him, *to the satisfaction of the jury*, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omis-

sion or mistake of his servants,—the person entitled to sue for the injury makes out a *prima facie* case for damages against the carrier, by proving the contract of carriage, that the accident happened in consequence of such breaking or failure, or such act, omission or mistake of his servants, and that, in consequence of the accident, the plaintiff sustained damage.”

And in § 2756, showing that the presumption arises not from the happening of the accident, but from a consideration of the cause of the accident, it is further said:

“It has been pointed out by an able judge that the presumption which arises in these cases does not arise from the mere fact of the injury, but *from a consideration of the cause of the injury*. Thus, it was said by Ruggles, J.: ‘A passenger’s leg is broken while on his passage in the railroad car. This mere fact is no evidence of negligence on the part of the carrier, until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises,—not, however, from the fact that the leg was broken, but from the circumstances attending the fact.’ ”

And a wilderness of cases is cited to sustain the announcement of the text. The cases on this subject are collated in the Century Digest, Vol. 9, commencing on page 1235, and the doctrine is almost universally announced that the fact that an injury results from a railroad collision without any fault of the passenger is *prima facie* evidence of carelessness, negligence, or want of skill on the part of the company, and the burden is upon it to prove that the accident was not occasioned by the fault of its agents. *Goble v. Delaware etc. R. Co.*, Fed. Cas. No. 5488a; *Smith v. St. Paul City R. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; *New Orleans etc. R. Co. v. Allbritton*, 38 Miss. 242, 75 Am. Dec. 98; *Chicago City R. Co. v. Engel*, 35 Ill. App. 490; *Central Pass R. Co. v. Bishop*, 9 Ky. Law 348; *North Chicago St. R. Co. v. Cotton*, 140 Ill. 486, 29

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N. E. 899, and many other cases, too numerous to cite, the circumstances of which are parallel in principle with the circumstances in this case, support the law announced. This is also in accordance with a decision made by this court in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, where it was said:

"Whenever a car or train leaves the track it proves that either the track or machinery or some portion thereof is not in a proper condition, or that the machinery is not properly operated."

And this is the just and equitable rule, for the cause of the accident is within the knowledge of the railroad company, while it might be a difficult matter for the plaintiff to prove what the cause of the accident was.

So far as the proof was concerned, we think, also, that there was ample proof to show negligence on the part of the appellant. There was testimony to the effect that this coupling had come apart several times before, and that it was within the knowledge of the appellant's servants that it was liable to come apart, and having that knowledge, it had no right to throw off the safety chains simply for the purpose of expediting its business to the extent of imperiling the life of the respondent. This manner of switching could only be safely done and relied upon on the supposition that the coupling could be absolutely depended upon, and the removal of the safety appliance, under such circumstances, constituted negligence on the part of the company towards its passengers. We think the court committed no error in overruling the appellant's motion for an instruction to find a verdict for the defendant.

In consideration of the fact that the amount of the judgment is not called in question, the second, third and fourth assignments of error are immaterial. The contention that the court erred in permitting respondent's counsel to read from law books, in the presence of the jury, in the course

of his argument, was decided adversely to such contention in *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79.

Among others, the court gave the following instruction:

"Under the allegations of the complaint and the admissions of the answer, plaintiff, when upon a mail car of the defendant as a postal clerk in the employ of the United States and in the discharge of such duties as such clerk, was a passenger and entitled to the care and caution to preserve him from injury that defendant, under the law, owes to a passenger. That duty was to carry the plaintiff safely so far as human care and skill would enable it to be done. Out of regard for human life and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to its hands, the law requires the carrier to exercise the highest degree of care, prudence and caution in running and operating its cars, so as to prevent injury to its passengers. It is not sufficient that the carrier has employed the same character of appliances, has exercised the same degree of care in their inspection, has taken the usual and ordinary precautions to avoid accidents, and that its trains were operated in the same manner as is customarily and ordinarily done by other carriers under like circumstances. The carrier is bound to use such quality of appliances and to exercise such care in the use of those appliances as human foresight would suggest as a measure to protect the passengers from harm, and the carrier cannot exonerate itself from exercising this ordinary vigilance for the safety of its passengers, which the law required by showing that other carriers have customarily and ordinarily done the same thing, unless the jury find from the evidence that this manner of doing the things was such as the highest degree of care, prudence and caution required so as to prevent injury to passengers."

It is contended by the appellant that the first part of the instruction, viz., that it is the defendant's duty to carry the plaintiff safely so far as human care and skill would enable it to be done, is opposed to the doctrine laid down by this court in *Johnson v. Seattle Elec. Co.*, 35 Wash. 382, 77 Pac. 677, where it was held that an instruction to the effect that a corporation engaged in the transportation

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of passengers is held by the law to the exercise of the highest degree of care in the equipment of its road and the manner of its operation—that a transportation company is not an insurer of the lives or limbs of its passengers, but the law called upon it to do whatever can be done to insure their protection while they are being transported—stated the law too broadly, this court saying that there are many things that a carrier could do which would conduce to the safety of its passengers, which it is not required to do simply because the practical prosecution of its business will not permit of it. It was, however, evidently not the intention of the court in that case to overrule the law announced in the previous case of *Northern Pac. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866, where it was said:

“Public policy and safety require that they [the carriers] be held to the greatest care and diligence in order that the personal safety of passengers be not left to chance or the negligence of careless agents; that, although the carrier does not warrant the safety of passengers against all events, yet his undertaking and liability as to them go to the extent that he, or his agents where he acts by agents, shall, so far as human care and foresight can go, transport them safely, and observe the utmost caution characteristic of careful, prudent men;”

and in *Clukey v. Seattle Elec. Co.*, 27 Wash. 70, 67 Pac. 379, where the court sustained the following instruction:

“Common carriers in the operation and running of their cars and especially common carriers such as this owe the duty to passengers whom they carry to use the highest degree of skill, care and prudence in the running and in the operating of those cars, so as to prevent injuries to those passengers.”

For these cases were discriminated in the *Johnson* case, the court holding that the expression that “the law calls upon it to do whatever can be done to insure their protection,” was stronger than the expression used in the former cases. The case of *Cogswell v. West Street etc. Elec. R. Co.*, 5

Wash. 46, 31 Pac. 411, was not called to the attention of the court in the *Johnson* case, that case having decided that it was the duty of the company to exercise the highest degree of care in the transportation of passengers, the court saying: "It has long been the rule that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence," citing *Philadelphia etc. R. Co. v. Derby*, 14 How. 468, 14 L. Ed. 502; *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019; and *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141. Neither was there cited to the court the case of *Sears v. Seattle Elec. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, or the court might have thought itself justified in holding that the words "but the law calls upon it to do whatever can be done" meant only whatever could be done in the prudent operation of the road. In the *Sears* case, at page 235, it is said:

"It is contended that the court erred in charging the jury that the defendant was bound to the exercise of the highest degree of care, prudence and caution in the running and operating of its cars, so as to prevent injury to its passengers. And it is claimed by the appellant that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. But we do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence, and caution. The highest degree of care, prudence, and caution in running and operating street cars so as to prevent injury to passengers, cannot be said to mean such a degree of care as will absolutely prevent in-

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jury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business."

The court, in the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, cited by this court in *Cogswell v. West Street etc. Elec. R. Co.*, *supra*, in commenting on this questions, says:

"The court only applied to a new state of facts, principles very generally recognized as fundamental in the law of passenger carriers. Those thus engaged are under an obligation, arising out of the nature of their employment, and, on grounds of public policy, vigorously enforced, to provide for the safety of passengers whom they have assumed, for hire, to carry from one place to another. In *Philadelphia & Reading Railroad Co. v. Derby* (14 How. 648), it was said that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence,—that the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents. This doctrine was expressly affirmed in *Steamboat New World v. King*, 16 Id. 469."

See, also, *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Co. v. Pollard*, 22 Wall. 241.

In fact, this is almost the universal authority. The expressions used by the courts—as far as human care and foresight can go, he must exercise the greatest possible care and diligence—extraordinary vigilance, aided by the highest skill—greatest degree of care, skill, and foresight—utmost skill and foresight—extraordinary diligence and foresight—utmost care and diligence in order to prevent injuries which human care and foresight can guard against—and words of similar import, all of them mean in effect the same as the language employed by the court in this case, viz., that the duty was to carry the plaintiff safely so far as human care and skill would enable it to be done. If it is the duty of the carrier to exercise the highest degree of care and skill, it

follows that the latter part of the instruction complained of is correct, for the highest degree of care and skill is the highest degree of care and skill which the circumstances surrounding the operation of the business will warrant, regardless of the amount of care and skill that is exercised by other carriers. And the carrier cannot escape the responsibilities for the violation of a duty which the law imposes upon him by pleading the violation of that duty by other carriers. If the custom of railroad companies was to be accepted as the measure of care, then there would be no stimulus to improve, each carrier relying, not upon its own exertions to exercise extraordinary care, but upon the custom of other carriers. In *Union Pac. R. Co. v. Hand*, 7 Kan. 380, it is pertinently said by the court:

"At the request of the plaintiff below, the court instructed the jury that, 'if the defendant could have prevented the accident by the utmost human sagacity or foresight, with respect to their track, then the defendant is liable.' This is established law. The defendant sought to have it explained to the jury by requesting the court to tell them 'that the utmost human sagacity required of the defendant did not require of the defendant to take such extraordinary measures in constructing, operating, and maintaining its railroad as are not and have not been in use in the constructing, operating, or maintaining of railroads.' This the court refused to give, and its refusal is assigned as error, and we are asked to correct it. We know of no reason peculiar to this State why human life and safety are not as valuable here as elsewhere; at any rate, it is not the province of courts to cheapen it, by construing away established principles, laid down to make life secure."

The same principle was announced in *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725.

Error is based upon the refusal of the court to give several instructions asked by the appellant, but the most of them are erroneous, if the instructions which the court gave are

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correct, and inasmuch as the court gave the following instruction:

"The plaintiff brings this action against defendant to recover damages for injuries which he claims he sustained by reason of the negligence of the defendant. The burden of proving negligence rests on the party alleging it, and where a party alleges negligence on the part of another as a cause of action he must prove the negligence by a preponderance of evidence, as verdicts must stand upon evidence and are not permitted to rest upon mere conjecture, however plausible. There is no presumption that because the plaintiff was injured the defendant was negligent; therefore, in this case, if the jury finds that the weight of evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover and your verdict should be for the defendant,"

it was not necessary to give the instructions asked for by the appellant to place all the questions of law involved in the case fairly before the jury.

No error appearing in any respect, the judgment is affirmed.

MOUNT, C. J., FULLERTON, and HADLEY, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5512. Decided May 23, 1905.)

WILLIAM HULET, *Appellant*, v. WALTER ACHEY, JR., *et al.*,
Respondents.¹

SALES — STANDING TIMBER — RESCISSION — FRAUD — FALSE REPRESENTATIONS AS TO QUALITY — INSPECTION BY VENDEE. A sale of standing timber and sawlogs cannot be rescinded by the vendee for false representations of the vendor as to quality, where the vendee had lived for a long time on the adjoining land, had twice gone over the land with a view of purchasing, and no claim is made that opportunity to make examination was not available.

¹ Reported in 80 Pac. 1105.

39	91
129	318
39	91
140	161
39	91
441	36
41	215
39	91
42	516

SAME—WARRANTY AS TO NUMBER OF LOGS—BREACH—RESCISSION—DAMAGES. It is not ground for rescinding a contract for the purchase of standing timber that there was a breach of a written warranty as to the number of sawlogs on the land, the remedy being by an action at law for damages.

Appeal from a judgment of the superior court for Chehalis county, Rice, J., entered August 8, 1904, upon the findings of the court and the advisory verdict of a jury, dismissing on the merits an action for the rescission of a sale of timber. Affirmed.

J. C. Cross, for appellant, contended that the vendee has a right to rely upon representations, although he makes a partial examination and has opportunity to investigate. *Turner v. Houpt*, 53 N. J. Eq. 526, 33 Atl. 28; *Redgrave v. Hurd*, 20 Ch. D. 1; Bishop, Non-Contract Law, § 337; Webb's Pollock on Torts (Am. ed.), 379; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40. A mutual mistake as to quantity would entitle the vendee to a rescission. Clark, Contracts (1st ed.), 301; Benjamin, Sales (4th Am. ed.), § 50a.

E. E. Shields, for respondents.

DUNBAR, J.—This is an action by appellant, plaintiff and vendee, to rescind a contract for the purchase of timber and sawlogs, upon the ground of fraud and misrepresentations as to the character and quality of the logs, and also because of a shortage in the number of logs stipulated for in the agreement. The court called a jury to determine issues of fact, and the jury found a shortage in the logs stipulated to be furnished by the respondents, and found that the plaintiff was induced to enter into the contract as a result of misrepresentations, knowingly made by defendants to plaintiff, as to the quantity and quality of the logs upon the lands. They also found specially that the plaintiff had the opportunity to examine the claim in question before he entered into the contract to purchase the same,

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and that the only thing that prevented him from making such an examination was his confidence in the representations of the defendants; but that it was within the power of the plaintiff to ascertain the correctness of such representations. Upon these findings, the court, correctly regarding the findings of the jury as advisory in an equity action, decided that, inasmuch as the plaintiff had an opportunity to ascertain the number and condition of the logs notwithstanding the defendants' misrepresentations, the plaintiff was not entitled to rescission, under the established law of this state, and that he was asking the court to do what he ought to have done himself before he entered into the contract; and judgment was entered in favor of the defendants.

It was decided by this court, in *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366, that one who has the means of knowledge before him, and who refuses or neglects to avail himself thereof, will not be heard to assert that he was deceived or defrauded. In that case it was alleged that the vendor had made representations that were false and fraudulent, which representations led to the purchase of the land in question. The court, in discussing the case, said:

"Conceding that these representations were false, and conceding that the purchaser relied upon them, there is not yet enough shown, it seems to us, in this answer to give the defendant relief. There is no fiduciary relation between the seller and the buyer alleged. It is not alleged that the buyer was in such a position that he was unable to make an investigation concerning the truth or falsity of these alleged representations. So far as the allegations of the answer are concerned, there is nothing to show that the land was not at hand when this contract was made, and that it could not, by the use of ordinary prudence, have been investigated by the purchaser; and in cases of this kind, it seems to us that parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand *in loco parentis* to them in the ordinary transactions of busi-

ness and their ordinary dealings with their fellow men. . . . If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind."

And this doctrine has been followed in an unbroken line of authority. See, *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

What was said in the case just quoted is particularly applicable to the case at bar. Here the appellant had lived for a long time adjoining the land upon which were the logs and timber purchased. He had, at least twice, gone on to the premises for the purpose of viewing the logs and timber, and presumably made such examination as was satisfactory to him. At all events, there is no claim that the examination which was afterwards made was not available to him at any time before he purchased, and, under the rule announced above, he will not be heard to say that the contract which he entered into was not his contract.

In this case, however, the following warranty appears in the contract, which was reduced to writing: "The said parties of the first part hereby covenanting and agreeing that the sawlogs are not less than four hundred in number," situate and being on the land described therein. On this question, as to the number of logs actually on the land described, there is a plain conflict in the testimony; but, whatever may be the appellant's rights in an action for damages for violation of the contract as to the failure to furnish the amount of logs stipulated for, he cannot avoid the whole contract in an action for rescission, his remedy being, if he has any, purely an action for damages in a law court. It might be that, even though it were found—and this is a question upon which we do not now pass—that there was a shortage in the

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number of logs, the respondents would supply the shortage within the time provided in the contract, and there would be no damages suffered by the appellant. In any event, these are questions to be determined, if determined at all, in another action.

The judgment is affirmed.

MOUNT, C. J., CROW, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

(No. 5641. Decided May 23, 1905.)

W. A. RITCHIE, *Appellant*, v. THE STATE OF WASHINGTON,
Respondent.¹

STATES—CONTRACTS—EMPLOYMENT OF ARCHITECT FOR STATE CAPITOL ANNEX—NOT IN WRITING—STATE CAPITOL COMMISSION—POWERS. The employment of a supervising architect for the erection of the capitol annex is not required to be by written contract; since Laws 1893, p. 462, § 4, providing that all contracts made with the board of state capitol commissioners shall be in writing, indorsed "approved" by a majority of the board, etc., applies only to contracts for construction and material, and not to an agreement with the architect to be selected and employed under § 6 of the act, which provides that his compensation is to be fixed by, and that he is removable at the pleasure of, the board, the law further requiring the architect to give bond for the faithful performance of his duties, while § 7 requires contractors to give bond for the faithful performance of their contracts.

SAME—EXTRA COMPENSATION—MODIFICATION OF CONTRACT—CLAUSE REQUIRING WRITTEN AGREEMENT. A written contract whereby the state capitol commission employed an architect for the erection of the capitol annex, which provides that the architect shall not be entitled to any extra compensation unless previously agreed upon in writing, does not preclude the contracting parties from thereafter modifying the contract or making a further contract for extra compensation without a writing; but the terms of the written contract may be considered in determining the fact of additional employment.

Appeal from a judgment of the superior court for Thurston, county, Linn, J., entered December 29, 1904, upon sus-

¹Reported in 81 Pac. 79.

taining a demurrer to the complaint, dismissing an action on contract. Reversed.

Vance & Mitchell, for appellant.

The Attorney General and *A. J. Falknor*, for respondent.

RUDKIN, J.—The complaint in this case contains four causes of action, but only two of these are before us on this appeal. The third cause of action is to recover the sum of \$1,560 for services performed by the plaintiff, at the special instance and request of the defendant, in preparing and furnishing written plans, specifications, schedule of quantities, and details of furniture, furnishings, etc., for the senate chamber and hall of the house of representatives in the annex of the capitol building. The fourth cause of action is to recover the sum of \$1,400 for services performed by the plaintiff, at the special instance and request of the defendant, in preparing plans, specifications, and detail drawings of structural ironwork (except roof trusses), including floor beam construction, cast iron columns, concrete and expanded metal fireproof floor construction and its supports, for the state capitol annex, in lieu of the hollow tile fireproof construction called for in the original plans and contract.

To both the third and fourth causes of action, the defendant interposed the defense that no copy of any contract in writing respecting said plans, specifications, details and schedules, or said services, was ever made out and certified by the secretary of the state capitol commission, endorsed "approved" or otherwise, with the date of approval, or delivered to said plaintiff, and no written contract between the plaintiff and the defendant for said plans, specifications, details and schedules, or for said services, was ever approved by a majority of said board, or recorded in a book kept for that purpose. To the fourth cause of action the additional defense was interposed, that on the 5th day of April, 1901,

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the plaintiff and the defendant entered into a written contract, whereby the defendant employed the plaintiff as supervising architect to prepare and furnish plans, specifications, drawings and details for the repairs, alterations, etc., in the state capitol building; that said contract contained the following provision, among others:

"Said second party in consideration of the performance of all the conditions, agreements and stipulations herein contained to be performed by said first party, his subordinates and assistants, agrees to pay said first party as full compensation, an amount equal to five per cent of the actual cost of such alterations, repairs, and additions, to be paid as follows, to wit: $2\frac{1}{2}$ per cent when contracts are entered into for the making and construction of such repairs, alterations and additions, within the limit of the funds available for such purpose, and the remaining $2\frac{1}{2}$ to be paid in installments as follows: $2\frac{1}{2}$ per cent of the amount of the estimate paid to contractor for work done and materials furnished for the preceding month; and the balance at the time of the completion of said alterations, repairs and additions, and the acceptance of the same by said commission. But in no event shall the total amount paid to said architect exceed the sum of five per cent of the actual costs of said alterations, repairs and additions, it being expressly understood that the said first party shall not be entitled to any extra compensation on any account whatever, unless previously agreed upon in writing;" that the services mentioned in the fourth cause of action were for changes and alterations made in the original plans for the building, and the same were so made without cost to the defendant; that no contract in writing, or otherwise, was entered into between the plaintiff and the defendant respecting such alterations, or respecting the furnishing of plans, specifications and detail drawings, excepting the written contract above set forth, which is made a part of the answer.

The reply admitted that there was no contract in writing between the plaintiff and the defendant for the services

mentioned in the third and fourth causes of action, and admitted the execution of the written contract referred to in, and made a part of the answer. By reason of these admissions in the reply, the court below granted a motion for judgment on the pleadings, and from the order of dismissal, this appeal is taken.

The respondent relies on the following provision in section 4 of the act of March 21, 1893, to sustain the judgment in its favor:

"All contracts made with said board and all bonds required by said board shall be regularly passed upon by the board in session and if adopted and approved by a majority of said board shall be recorded in a book kept for that purpose, and a copy of such contract shall be made out and certified by the secretary indorsed 'approved,' with the date of approval, and delivered to the other party to the contract. Until such delivery no contract shall be valid or binding on either party." Laws 1893, p. 462, § 4.

Must the employment of an architect for the building be by written contract in order to be valid under the above provision? Said section 4 also provides for the appointment of a secretary. His compensation is fixed by the board at not to exceed \$125 per month for the time actually employed, and he is removable at the pleasure of the board. Section 6 provides for the employment of an architect, and the manner of his selection. His compensation is fixed by the board, and he is removable at their pleasure. Section 9 of the act provides for the appointment of a superintendent. His compensation is fixed by the board at not to exceed \$8 per day, and he also is removable at pleasure. Section 7 of the act provides that,

"No construction or material shall be furnished except pursuant to bids advertised for, as herein provided. All lettings of construction or material exceeding in amount the sum of five hundred dollars (\$500) shall be advertised in two daily newspapers of general circulation, for not less than ten days. The bid of the lowest responsible bidder shall

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be accepted, saving that the board shall have the right to reject all bids. The performance of every contract shall be secured by a bond to the State of Washington, in a sum not less than one quarter of the contract price, secured by two securities, qualifying in double the amount of the bond, each of whom shall be a *bona fide* resident of this state, said bond to be conditioned for the faithful performance of said contract."

Section 14 of the act provides for the auditing of all claims, bills, and demands for work done, labor performed and material furnished.

We fully agree with counsel for respondent that the powers of the state capitol commission are defined by the act creating the board, and that the appellant cannot recover if that act requires his contract of employment to be in writing. We cannot agree, however, with the contention that the employment of an architect comes within the provisions of the act requiring certain contracts to be in writing. We think the contracts for construction and material referred to in section 7 are the contracts, and the only contracts, which fall within the requirements of section 4. Said section 4 refers to "all contracts made with said board and all bonds required by said board." The requirements of this section apply alike to the contract and the bond. The bond referred to is manifestly the bond given for the faithful performance of the contract. While the secretary and architect are required to give bonds, their bonds are conditioned for the faithful performance of *their duties*, and not for the faithful performance of any contract between them and the board. The secretary, the architect, and the superintendent are removable at the pleasure of the board, and such power of removal is in a measure inconsistent with any definite contract of employment. We think the object of the statute will be fully satisfied by limiting the requirements of section 4 to the contracts for construction and material referred to in section 7. To extend the requirements to all contracts of whatever kind would unduly hamper the board in the

discharge of their duties, and we do not think that such was the intention of the legislature.

The other defense interposed may be valid, and it may not. It presents a question of fact, not of law. It is common, in building contracts, to provide that no claim shall be made for extras unless ordered in writing. Such provisions are usually a limitation on the authority of architects, engineers, and other agents in charge of the work. They are intended for the protection of the employer, are valid, and should in all proper cases be enforced. But it must be remembered that a party cannot, by contract, limit his own power as to its modification, or as to the making of future contracts. Notwithstanding the parties in this case agreed that no charges for extra compensation should be made on any account whatever, unless previously agreed upon in writing, they nevertheless retained full power to modify this contract, or to make a further contract without a writing; and in this case it is for the court or jury to say, under all the circumstances, whether the services mentioned in the fourth cause of action were performed under the written contract attached to the answer, or under some subsequent agreement, express or implied. *Wilkens v. Wilkerson* (Tex. Civ. App.), 41 S. W. 178; *Bartlett v. Stanchfield*, 148 Mass. 394, 19 N. E. 549, 2 L. R. A. 625. In determining this question, they have a right to take into consideration the terms and provisions of the written contract between the parties.

For the error in granting the motion for judgment on the pleadings, the judgment is reversed and a new trial ordered.

MOUNT, C. J., FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

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(No. 5293. Decided May 23, 1905.)

HANS BENSON *et al.*, Respondents, v. THE CITY OF SPOKANE,
Appellant.¹

MUNICIPAL CORPORATIONS—BRIDGES—NEGLIGENCE—DEFECTIVE CONDITION—DUTY OF CITY—INSTRUCTIONS. In an action for personal injuries sustained through the defective condition of a bridge, an instruction not technically accurate, declaring it to be the duty of the city to use reasonable care to keep its bridges in good, safe condition, and to the effect that it would be liable for failure to so keep them in such condition, is not prejudicial error when immediately followed by an instruction that the law did not require the city to keep its bridges absolutely safe, and correctly defining ordinary care and limiting the duty of the city to reasonable and ordinary care in guarding against accidents.

SAME—PLEADING AND PROOF—UNESSENTIAL DETAILS—DEFECT THE PRIMARY CAUSE OF THE ACCIDENT—INSTRUCTIONS. In an action for personal injuries sustained by reason of a defect in a bridge, which caused the horse to tip over the buggy, the plaintiff is not required to prove the allegation that the horse stepped into the hole and then violently backed off; and it is proper to instruct that the defendant is liable if the horse shied at the hole without stepping into it provided that the defect was such as to cause an ordinarily gentle horse to shy and the plaintiff was free from negligence; since proof of unimportant details explaining the result is not essential where the defect complained of is the primary cause of the accident.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered March 7, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by reason of a defect in a bridge. Affirmed.

John P. Judson and *A. H. Kenyon*, for appellant.

Horace Kimball and *Miles Poindexter*, for respondents.

MOUNT, C. J.—Action for personal injuries. The plaintiffs obtained a judgment in the court below, and defendant appeals. The respondent Mrs. Benson, while attempting to drive a horse and buggy upon a bridge maintained by the

¹ Reported in 80 Pac. 1106.

city of Spokane within its borders, was thrown from her buggy, and severely injured. The negligence complained of was, that the city had permitted the bridge to become and remain out of repair, so that the approach to the bridge contained a hole in the floor, eight or ten inches wide and four feet long; that, when she came up to the bridge, not knowing the condition thereof, and with nothing to put her on notice of the condition, her horse stepped into the hole, the buggy was thrown forward, then backward, and tipped to one side, so that she was thrown out upon the bridge. By the fall her right hip was broken and her right shoulder was dislocated. The bridge was in common use upon a public highway, and had remained in an unsafe condition for more than a week. The city had been notified of the condition several days prior to the accident. The case was tried to the court and a jury, and a verdict was returned for \$3,000.

The only errors alleged are based upon instructions given by the court, and instructions requested by appellant and refused by the court. The court instructed the jury as follows:

"I instruct you that the defendant . . . is bound under the law to use all reasonable care and caution to keep its streets, sidewalks and bridges in safe condition for travel in the ordinary mode of travel, and that for failure to so keep its bridges, streets and sidewalks in safe repair it is liable to one who suffers injury or damage by reason of their failure to keep the bridges, streets and sidewalks in reasonable repair; provided, however, the injured party himself has used all reasonable care and caution to prevent injury to himself. . . . I instruct you if you believe from a preponderance of the evidence that the corporate authority of the city of Spokane did not use reasonable care and supervision over that portion of the street where the injury in question is alleged to have occurred, that is to say, the bridge over Crystal Springs Creek, to keep in good, safe condition, and by that means allowed it to become defective and unsafe, as alleged in plaintiffs' complaint, and

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if the jury further believe from a preponderance of the evidence that the plaintiff, in attempting to drive over the bridge, by reason of such defect was injured and has sustained damage thereby as alleged in her complaint, and that at the time she was exercising reasonable care and caution to avoid such injury, that the defendant is liable and your verdict should be for the plaintiff."

While these instructions may not be technically accurate in their wording, they convey the idea that it is the duty of the city to use reasonable care to keep its bridges in a reasonably safe condition for ordinary travel. The court said that it was the duty of the city to exercise reasonable care to keep its bridges in good, safe condition. If there is any doubt that these instructions impose a greater duty upon the city than the law requires, that doubt is removed by other instructions immediately following, in which the court said:

"Ordinary care as used in these instructions is that degree of care which an ordinarily careful and prudent person would or should exercise under like or similar circumstances. The law does not require that the streets and bridges of the city shall be kept absolutely safe, but only that reasonable care shall be exercised to keep them in a reasonably safe condition. The city is not an insurer of safety. It does not undertake to warrant against accident and injuries. It is not bound to exercise extraordinary care, and if you believe from the evidence that this defendant did use ordinary care and reasonable care and diligence in guarding against the occurrence of accidents by reason of the condition of the bridge, but nevertheless the accident complained of occurred, then your verdict must be for defendant."

Taking all these instructions together, it is clear that the duty of the city was properly defined to the jury.

The court gave the following instruction:

"I instruct you further, gentlemen, that if you believe that there was a hole in the bridge, and that the defendant knew or ought to have known it was there, as I have instructed you, but that the horse did not step into the hole but instead

shied at the hole, and backed away, cramping the buggy, thus throwing the plaintiff out, and she was using due care and caution to prevent injury to herself, then the defendant would be liable if plaintiff was injured; provided, however, you further find that the hole in the bridge was such as was calculated to cause an ordinary horse to shy and become frightened. And it is for you to determine whether the hole in the bridge, if there was one there, was such an object as was calculated to cause horses generally to shy and become frightened."

The way the accident happened, as described in the claim filed with the city, the language of which claim is substantially copied in the complaint, is as follows:

"The horse, hitched and attached to the buggy in which the said Karstean Benson was sitting, passed on said bridge, drawing said buggy with him, and the said horse did step into the aforesaid hole in the planking of said bridge, which caused said horse to pitch forward, jerking said buggy with him, and said horse in endeavoring to extricate his foot from such hole in said bridge jerked violently backward, jerking said buggy with him and throwing said Karstean Benson violently out of said buggy, causing her to fall violently and with great force and shock on said bridge."

There is substantial evidence in the record supporting the statements as alleged. But the theory of the defense was, that the horse came up to the hole in the bridge and stopped; that thereupon the plaintiff, or her daughter who was riding in the buggy with her, attempted to force the horse over the hole by striking him with the lines, and that the horse refused to go, but backed away, turning the buggy down an embankment and throwing the plaintiff out. Appellant contends that the instruction last above quoted permits the plaintiffs to recover, independently both of the cause of action stated in the claim filed with the city, and of the allegations of the complaint. But we think this contention is not well founded. If the primary cause of the injury was the defective and unsafe condition of the bridge, it makes no difference whether the horse stepped into the hole with one,

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or with two, of his feet, or was thereby frightened and backed away, or whether he was frightened and backed away before he stepped into it at all. The hole, in any event, was the cause of the horse backing, and the result is the same to the respondent. It was no more necessary to prove that the horse actually put one foot into the hole than it was to prove that the horse first fell forward and then ran backwards. None of these things were essential to state a cause of action. They served only to explain the result. These facts may vary in different cases, or the witnesses may vary as to these unimportant details in each case, while the cause and result still remain unchallenged. In *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, where this same question was raised, we said:

“ . . . it can make no difference as to the city's liability therefor whether the injured person stepped into an existing hole or a hole made by her at the time of the injury, or, if she did step into an existing hole, whether that particular hole existed for a long or for a short period of time, provided, of course, she was not guilty of contributory negligence.”

The evidence offered by the appellant upon this point was material only as tending to show contributory negligence. If the horse saw the hole and stopped, and was urged to go and refused, these facts were material to show that the respondent knew, or should have known, of the danger, and therefore was guilty of negligence herself. But it was unimportant to contradict the fact that the horse stepped into the hole, because that fact itself was immaterial except as it was a part of the *res gestae* leading up to the result.

With this view of the matter, it is unnecessary to discuss the instructions requested by the appellant and refused by the court, because the requested instructions were based upon the theory that the instruction above discussed was erroneous. Instructions requested bearing upon other ques-

tions were given, in substance, by the court, and it is therefore unnecessary to notice them. There are other errors assigned, but none of them are meritorious. The instructions given by the court fairly and fully covered the law of the case.

There is no error apparent in the record. The judgment is therefore affirmed.

DUNBAR, HADLEY, and FULLEERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5239. Decided May 23, 1905.)

T. W. FLEMING, *Respondent*, v. L. G. WILSON *et al.*,
Appellants.¹

TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION. It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws 1903, p. 50, and error cannot be predicated thereon.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 23, 1903, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

James B. Murphy, for appellants.

Smith & Cole, for respondent.

PER CURIAM.—The only question presented on this appeal is whether the lower court may call a jury in a law case where the parties have waived a jury under the provisions of the act of March 6, 1903, relating to jury trials. Laws 1903, p. 50. This same question was presented to this court under substantially the same facts in *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209, where we said:

“It is within the discretion of the trial court to permit a demand for a jury to be made after the case is called

¹ Reported in 80 Pac. 1104.

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to be set for trial, or to submit the issues of fact in a case to a jury of its own motion, and no error can be predicated upon its ruling in that regard."

Under this rule, the judgment must be affirmed. It is so ordered.

(No. 5682. Decided May 23, 1905.)

ANDREW HUMES, *Respondent*, v. C. D. HILLMAN *et al.*,
Appellants.¹

APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—MOTION TO STRIKE—AFFIDAVITS. A motion to strike a statement of facts must be heard upon the record, and conflicting affidavits of the attorneys as to an extension of time for filing the statement will not be considered by the supreme court.

APPEAL AND ERROR—STATEMENT OF FACTS—TIME FOR SETTLEMENT—EXTENSION—ORAL AGREEMENT. An oral agreement to enter into a stipulation to extend the time for filing a statement of facts cannot be considered, and will not prevent the striking of a statement not settled within the time prescribed by law.

APPEAL AND ERROR—RECORD—TRANSCRIPT—FAILURE TO FILE IN TIME—DISMISSAL. Where the transcript is not filed within the time prescribed by law, without any sufficient excuse being made for such failure, nor at the time a motion for dismissal is made, the appeal will be dismissed.

Motion to dismiss an appeal from a judgment of the superior court for King county, Morris, J., entered January 4, 1905. Granted.

William C. Keith, for appellants.

C. A. Reynolds, for respondent.

DUNBAR, J.—Respondent moves to strike from the record the statement of facts filed by appellants, and to dismiss the appeal from the judgment, entered herein by the superior court of King county, Washington, for the reason, that the statement of facts was not filed within thirty days

¹ Reported in 80 Pac. 1104.

of the date of the judgment; that no extension for the filing of said statement was granted by order of court, upon notice to respondent or by stipulation; and that the transcript was not filed or certified within ninety days from the serving and filing of the notice of appeal.

The judgment was entered January 4, 1905; motion for new trial overruled January 31, 1905; statement of facts served April 7, 1905; statement of facts settled April 15, 1905. Under Pierce's Code, § 679, it is evident that the statement of facts was not filed within the time prescribed by law, unless the time was enlarged by stipulation, or by order of court made on notice to the adverse party, and that the transcript was not filed within the provisions of § 1061, of Pierce's Code.

There is no excuse offered in the record for the failure to settle the statement of facts within the time prescribed by the statute, excepting the claim that an oral stipulation was entered into between the attorneys for the respondent and appellants, whereby the time was to be extended. This is denied by the attorney for the respondent, and affidavits are presented by both the respondent and the appellants upon this proposition. This court has uniformly held that it is not within its province to decide between attorneys on questions of this kind, and the affidavits in this case, with criminating and recriminating accusations, exemplify the wisdom of the rule. There must be a record here upon which the court can act.

It is contended by the attorney for the appellants that, inasmuch as the counsel for respondent agreed to enter into a written stipulation, such agreement is equivalent to a written stipulation. But there seems to be no force in this contention. Even conceding, without deciding, that such an agreement had been made, the agreement to enter into a written stipulation was as much an oral agreement as any other oral agreement.

There having been no written stipulation, or order of the

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court on notice to the adverse party, to extend the time for filing the statement of facts, and no excuse being offered for a failure in that respect, the statement of facts will be stricken; and the transcript, not having been filed within the time prescribed by law, without any sufficient excuse for such failure, and not having been filed at the time this motion was made, will also be stricken, and the cause dismissed.

MOUNT, C. J., ROOT, HADLEY, FULLERTON, CROW, and RUDKIN, JJ., concur.

(No. 5286. Decided May 23, 1905.)

C. E. McAVOY, *Respondent*, v. I. H. JENNINGS, *Appellant*.¹

APPEAL AND ERROR—TRANSCRIPT—TIME FOR FILING—DISMISSAL. The filing of the transcript within ninety days is not jurisdictional, and an appeal will not be dismissed for failure to file the transcript within such time, when filed before the motion to dismiss was made.

ASSIGNMENT FOR BENEFIT OF CREDITORS—GARNISHMENT OF ASSIGNEE—ANSWER—MOTION FOR JUDGMENT—AMENDMENT—CONSENT OF CREDITOR. Upon a motion for judgment on the answer of a garnishee, which admitted that he held the property of the principal defendants as a trustee for the benefit of all the creditors under a written assignment, the answer, in the absence of demurrer or motion, should be treated as amended to allege that the assignment was made at the instance of the plaintiff, thereby precluding the plaintiff from attacking the assignment as fraudulent, and raising an issue of fact; hence judgment on the pleadings against the garnishee is erroneous, notwithstanding a reply by the plaintiff denying the plaintiff's consent to the assignment.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 20, 1904, in favor of the plaintiff against a garnishee, upon motion for judgment on the pleadings. Reversed.

Leopold M. Stern, for appellant.

Roberts & Leehey, for respondent.

¹ Reported in 81 Pac. 77.

MOUNT, C. J.—On November 19, 1903, M. J. Harkins, L. W. Harkins, and E. E. Harkins, copartners under the firm name of the "Harkins Company," executed the following agreement in writing:

"BILL OF SALE.

"This Indenture, made this 19th day of Nov., 1903, by and between E. E. Harkins, L. W. Harkins and M. J. Harkins, of Seattle, Washington, doing business under the firm name and style of the Harkins Co., parties of the first part, and I. H. Jennings, of Seattle, Washington, party of the second part,

"WITNESSETH: That, whereas, the parties of the first part have, for some time past, been carrying on a general grocery business at No. 1501, 14th Avenue, in Seattle, Washington, and are owners of a general stock of groceries, fixtures, three horses, two wagons, and a large number of book accounts, contracted in the course of said business, and also a leasehold interest in said premises; and whereas, the said parties of the first part, in the conduct of said grocery business, have become indebted to various persons and firms, which persons and firms are enumerated in the list of the creditors hereto attached, and in the amounts set opposite their respective names; and whereas, the said parties of the first part desire to pay each of said persons and firms mentioned in said list equably and ratably; and whereas, the said party of the second part is willing to receive a bill of sale of the said stock of general merchandise, fixtures, horses, wagons and harnesses, and an assignment of all book accounts and of the leasehold interest in and to the said premises, and is willing to sell all of said personal property of said leasehold interest, and to collect said book accounts; and after deducting the expenses of administering this trust, to apply the balance to the proceeds arising from said sale and such collections, equably and ratably to the claims of all creditors mentioned in the list of creditors hereto attached;

"Now, know all men, by these presents, that the said parties of the first part, for and in consideration of the sum of one dollar in hand paid to the parties of the first part by the party of the second part, and other good and valu-

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able considerations, to be paid as hereinafter specified, do hereby grant, bargain, sell and convey and deliver unto the said party of the second part the entire stock of goods, wares, and merchandise, and all fixtures contained in the store building located at No. 1501, 14th Avenue, in Seattle, Washington, together with the good will of said business, and also the right to immediate possession thereof. Parties of the first part also sell to the said party of the second part the said horses, wagons, and harnesses, and hereby assign and transfer to said party of the second part all outstanding book accounts as the same appear upon the books of accounts kept by said parties of the first part; parties of the first part also assign and transfer all their right, title and interest in and to the lease upon said premises.

"To have and to hold the said personal property above-mentioned, together with the book accounts and good will of said business, unto the said party of the second part, his heirs, executors, administrators and assigns, in trust for the uses and purposes hereinafter mentioned; that is to say, in trust to take immediate possession of all of said personal property, and to sell the same collectively or separately at public or private sale, as he may deem best; and to collect, sell or compromise all of said outstanding book accounts; and after deducting the expenses of administering the said estate, to apply the proceeds remaining, equably and ratably, among the creditors of the parties of the first part enumerated in the list of creditors hereto attached; provided, however, that each creditor, before being entitled to receive his pro rata under the terms of this agreement, shall deliver to the party of the second part, a release of all claims against the said parties of the first part.

"It is expressly agreed that this conveyance shall not be construed to be a deed of voluntary assignment under the laws of the state of Washington.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals," etc. (Duly signed.)

To this instrument was attached a list of creditors for whose benefit the transfer was made. Immediately upon the execution of this agreement, Mr. Jennings took posses-

sion of all the property therein mentioned, and afterwards sold the tangible property, and proceeded with the collection of the book accounts. The American Savings Bank & Trust Company was one of the creditors named in the list attached to the instrument above copied. After the transfer to Jennings had been made, the bank assigned its claim to McAvoy, the respondent, who thereupon commenced an action in the superior court of King county to reduce the claim to judgment against the members of the Harkins Company. In that action McAvoy caused Jennings to be summoned as a garnishee defendant.

Jennings appeared in the garnishment proceedings and answered, denying that he was indebted to said copartnership, or any member thereof, and denying that he had any property in his possession or under his control belonging to defendants in the action; and, by way of further answer, he set forth the trust agreement above copied, and alleged that he had taken possession of all the property therein stated, and had converted the same into money, and that he had in his possession the sum of \$854.02, which he was prepared to distribute pro rata among the creditors in accordance with the said agreement. He also alleged that the total of the debts amounted to \$3,200.

The plaintiff in the garnishment proceedings, without moving against the answer of the garnishee, filed a reply denying all the allegations in the answer, and alleged that the agreement and transfer of the property therein described was fraudulent and void as to creditors, because it was not in compliance with the sales-in-bulk act, for the reason that the sale was without consideration and there was no affidavit of the vendors setting out the names of all the creditors and the amount due each. The reply also alleged that the transfer was made without the consent of all the creditors, and without the knowledge, consent, or ratification of the plaintiff, or his assignor.

After this reply was filed, the plaintiff moved the court

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for a judgment against the garnishee upon his answer, and upon the pleadings in the case. The garnishee also moved for a discharge upon like grounds. The court, upon a hearing of these motions, granted the motion of the plaintiff, and rendered judgment against the garnishee for \$576, which was the amount of the plaintiff's claim against the copartnership of the Harkins Company. Mr. Jennings, the garnishee defendant, appeals.

Respondent moves to dismiss the appeal because no transcript was filed in the clerk's office within ninety days after the notice of appeal. The notice of appeal was filed on April 20, 1904. The transcript was filed on August 27, 1904. The motion to dismiss was not made until after the transcript had been filed. We have frequently held that the failure to file the transcript within ninety days is not jurisdictional. *Ellis v. Bardin*, 36 Wash. 122, 78 Pac. 677, and cases cited. See, also, *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842. The motion is denied.

Conceding, for the purposes of this appeal, that the act relating to sales of stocks of merchandise in bulk applies to the transfer in question in this case, and also that the transfer is void as to creditors not parties thereto, without intending to decide either of these questions, the judgment of the lower court must still be reversed. The appellant, in answer to the writ of garnishment, denied that he was indebted to the partnership or any member thereof, and denied that he had any property in his possession or under his control belonging to the partnership or any member thereof; then, by way of affirmative defense and "in explanation" of his answer, set up the assignment to him, and alleged that, under the trust deed, he had in his possession \$854.02 to be distributed pro rata among the creditors, one of whom was the plaintiff or his assignor. It is true that the affirmative answer did not allege directly that the assignment was made at the instance of the plaintiff or his assignor, or that the

plaintiff had notice thereof and acquiesced therein and ratified the same, but the answer was not attacked upon that ground. If respondent had moved against the answer by demurrer, the appellant would have been authorized to amend in this respect. *Green v. Moore*, 24 Wash. 241, 64 Pac. 151. Respondent, however, filed a reply denying all the allegations of the answer, and treated the answer as having alleged that the transfer was made by and with the consent of the plaintiff; because it says, "and denies that said transfer was made with the consent of all the creditors and says that it was not made with the knowledge or consent of this plaintiff, or the American Savings Bank & Trust Company, a corporation, as assignor." This reply, of course, was not to be considered upon a motion of the plaintiff for judgment upon the answer. The only effect of the reply was to put in issue the facts alleged in the answer.

We must, therefore, upon this appeal, treat the answer as the lower court was required to treat it, as containing all amendments which could have been made. It is clear that, if the transfer of the partnership property was made to the appellant by the partnership at the instigation of the creditors, for the purpose named, the transfer was not void as between the parties. A creditor, who was a party to the transfer and at whose instance and for whose benefit the transfer was made, cannot be permitted to say that it was fraudulent as to him, or that, because it was fraudulent as to some other creditors, he may take advantage of his own wrong and thereby obtain a preference by attachment or garnishment. Under the pleadings in the case, there was a clear issue of fact, which should have been tried out in the regular way.

The judgment is reversed, and the cause remanded for further proceedings.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5681. Decided May 29, 1905.)

THE STATE OF WASHINGTON, *on the Relation of A. S.
Gibson et al., Plaintiff, v. THE SUPERIOR COURT
FOR PIERCE COUNTY et al., Respondents.*¹

APPEAL AND ERROR—SUPERSEDEAS—TEMPORARY INJUNCTION—OPERATION OF SHOOTING GALLERY AND MUSICAL INSTRUMENTS—NUISANCE. A temporary injunction pending the action, enjoining the continuance of the operation of a shooting gallery and certain musical instruments, as a nuisance especially injurious to the plaintiff, cannot be superseded on appeal, as a matter of right, since it is a preventive and not a mandatory injunction.

Application filed in the supreme court May 2, 1905, for a mandamus to compel the superior court for Pierce county, Huston, J., to fix the amount of a supersedeas bond, upon an appeal from a temporary injunction. Denied.

Williamson & Williamson and *J. W. A. Nichols*, for relators.

H. H. Johnston, for respondents.

FULLERTON, J.—On April 14, 1905, one John Grantham brought an action in the superior court of Pierce county to enjoin the relators from operating, in connection with their business, a shooting gallery, and two certain instruments known respectively as a "tonophone" and an "orchestration," alleging that their operation constituted a public nuisance specially injurious to himself. At the time of commencing his action, Grantham applied for a temporary injunction pending the final determination of the action. Notice of this application was given the relators, and a hearing had thereon, at which hearing the court granted the injunction applied for, in which it restrained the relators from operating the shooting gallery, the tonophone, and orchestration, until the final determination of the action. The

¹ Reported in 80 Pac. 1108.

relators gave notice of appeal from the order, and applied to the court to fix the amount of the bond it would require to supersede the order pending the appeal. The court declined to fix the amount of the bond, on the ground that the order was not one that could be superseded. The relators thereupon applied to this court for a writ of mandate to compel the trial court to fix the amount of such bond.

From the petition for the writ and the return thereto, it is gathered that Grantham, for some years last past, has held a lease upon a part of a certain building, in the city of Tacoma, in which he has conducted a hotel and lodging house, under the name of "Hotel Gordon;" that, about a year preceding the commencement of this action, the predecessors in interest of the relators leased the remaining part of the building, being a room on the ground floor, and fitted it up for the exhibition of pictorial views, enlarged and made attractive by means of electrical contrivances. The "tonophone" was put in at or near the time the business was first opened, the shooting gallery was put in about December 4, 1904, and the "orchestrion" about one week prior to the commencement of the action. It will be observed, therefore, that the order of the court had the effect of changing the *status quo* of the parties, as it prohibited the relators from conducting a part of their business and from operating the so-called musical instruments, all of which they were doing at the time the injunction issued.

The relators contend that, when considered with reference to the right of supersedeas, there is a distinction between an injunction that merely restrains the commission of an act the defendant is about to commit or attempting to commit, and one that restrains the continuance of an act which he is performing at the time of the issuance of the order; that the one cannot be superseded on an appeal, for the reason that the *status quo* of the parties is not changed by the injunction, the effect of the same being in fact to main-

tain the *status quo* of the parties; while the other can be superseded, for the very reason that the injunction does not maintain, but actually changes, the *status quo*.

The distinction here sought to be drawn between injunctions that can be superseded and those that cannot is not the distinction ordinarily drawn by the cases. According to the usual classification, injunctions are either mandatory or prohibitory; a mandatory injunction being one that compels the performance of some affirmative act, while a prohibitory injunction is one that operates to restrain the commission or continuance of an act; and it is only the former that is superseded by taking an appeal and giving the supersedeas bond provided by statute. The reason usually given for this distinction is that an appeal and supersedeas does not destroy the intrinsic effect of a judgment; that, notwithstanding the appeal, the judgment is still the measure of such of the rights of the parties as it adjudicates; and until reversed it operates as an estoppel, and as *res judicata*, as effectively as it would had no appeal therefrom been taken, and no supersedeas bond given. In other words, the appeal and supersedeas operates as a stay of affirmative action upon the judgment, as a supersedeas of execution, but does not destroy the judgment in so far as it can operate without the aid of an execution.

While there are cases to the contrary, this distinction is supported by the great weight of authority. In the *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915, Mr. Justice Clifford, speaking for the court, said, "It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court;" and it was held that the same rule applied to writs of error from state courts in equity proceedings. To the same effect is *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888. In *Leonard v. Ozark Land*

Co., 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445, it was said:

"The injunction ordered by the final decree was not vacated by the appeal. *Slaughter-House Cases*, 10 Wall. 273, 297; *Hovey v. McDonald*, 109 U. S. 150, 161. It is true that in some of the *Slaughter-House Cases* the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case, but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey v. McDonald*, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding the appeal."

And in *Knox County v. Harshman*, 132 U. S. 14, 10 Sup. Ct. 8, 33 L. Ed. 249, it was said: "The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect." In *Central Union Tel. Co. v. State*, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136, the rule is stated in the following language:

"The effect of a supersedeas is to restrain the appellee from taking affirmative action to enforce his decree, but it does not authorize the appellant to do what the decree prohibits him from doing. The doctrine which our decisions have long maintained is thus stated in *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411: 'Indeed, the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, stands binding upon the parties, as to every question directly decided.'"

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In *National Docks etc. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, 33 Atl. 936, it was said:

"Moreover, I find no warrant for the insistent that the mere existence of an appeal suspends or in any manner affects the present inherent validity and force of the decree appealed from. The person in whose favor it is rendered is denied process to enforce it, and that is all. Consequently, where the decree is itself an injunction, that injunction is in force and must be obeyed, unless, to continue the *status quo* of the parties pending the determination of the appeal, this court or the court of errors and appeals shall order a suspension of its effect. And it is not necessary to issue a writ to bind the parties to the suit to obedience to such a decree. Being before the court, they are bound, at their peril, to take notice of the provisions of any decree rendered in due course upon the issues tendered."

In *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781, where the effect of the statutory provision is that a perfected appeal shall stay execution, and all further proceedings upon a judgment appealed from, it is said:

"Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the federal courts and those of the other states, and the overwhelming weight of authority is that injunctions ordered on final hearing on the merits are not vacated by an appeal from that decree. A stay of proceedings from its nature operates only on orders and judgments commanding some act to be done, and does not reach injunctions."

To the same effect are the cases of *Gardner v. Gardner*, 87 N. Y. 18; *Genet v. Delaware etc. Canal Co.*, 113 N. Y. 475, 21 N. E. 390; *Hawkins v. State*, 126 Ind. 296, 26 N. E. 43; *Sixth Avenue R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430; *James v. Markham*, 125 N. C. 145, 34 S. E. 241; *Bullion etc. Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 151, 13 Pac. 174.

The only cases we find supporting the relators' contention are from California. In that state all the decisions lay down the general rule that a mandatory injunction can be

superseded by an appeal and supersedeas bond, while a prohibitory injunction cannot, but they do not agree on the question whether it is the *status quo* at the time of the commencement of the action, or at the time of taking the appeal, that is maintained by the stay of execution when a stay is effected. In *Merced Min. Co. v. Fremont*, 7 Cal. 130, it is said that,

“A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction;”

and, further, that,

“The stay of proceedings, pending an appeal, has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted; it operates so as to prevent any future change in the condition of the parties.”

This case was approved on both propositions in the cases of *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333, and in *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580. On the other hand, in the cases of *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; and *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436, the court, while adhering to its holding that a prohibitory injunction could not be superseded, says that the effect of a stay of proceedings is to leave the parties in the same situation with reference to the rights involved in the action as they were prior to the granting of the injunction. These cases make no mention of the contrary rulings, and it may be that the statement was made through inadvertence, as the question does not seem to have been involved in either of them. But be this as it may, it seems to us that the cases first cited state the rule in accordance, not only with the great weight of authority, but with the better reason.

In this state, while no case presenting the precise facts of this case has been determined, it seems to us that the

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question presented has been determined in principle. In *State ex rel. Commercial Elec. etc. Co. v. Stallcup*, 15 Wash. 263, 46 Pac. 251, we held that a temporary injunction, restraining and enjoining the defendant from stringing electric wires on the streets of the plaintiff city, could not be superseded on an appeal therefrom. In *State ex rel. Flaherty v. Superior Court*, 35 Wash. 200, 77 Pac. 33, we held the same way with reference to a final order of injunction enjoining the appellant from fencing up and otherwise obstructing a roadway. In these cases the question presented differed from the question in the case before us, in that the injunctive orders restrained the commission of an act, while the one before us restrains the continuance of an act. But, according to all of the definitions, an injunction which restrains the continuance of an act or a series of acts is just as much a preventive or prohibitory injunction as is one which restrains the commission of an act, and, this being so, neither can be superseded on an appeal.

It is thought, however, that the case of *State ex rel. Byers v. Superior Court*, 28 Wash. 408, 68 Pac. 865, lays down a different rule. But it will be seen, on an examination of that case, that the injunctive order there in consideration was a mandatory injunction, as it commanded the defendant to deliver to the appellant certain books of account, moneys, and other property, of which he was in possession, belonging to a corporation. While the court said that the effect of a stay of proceedings was to preserve the *status quo* of the parties, it is clear that it meant nothing more than that a mandatory injunction could be superseded.

It may be that the court itself has inherent power to suspend the effect of a prohibitory injunction, when the purposes of justice require it, pending a decision of the merits on an appeal (*Hovey v. McDonald, supra*), but this question we do not decide. The relators insist that they are entitled to supersede the order appealed from as a matter of

right, and this we hold they cannot do, as the order is a preventive, and not a mandatory, injunction.

The application is denied.

MOUNT, C. J., RUDKIN, CROW, HADLEY, and DUNBAR, JJ., concur.

(No. 5532. Decided June 6, 1906.)

P. S. HANER *et al.*, Respondents, v. M. FURUYA, Appellant.¹

PRINCIPAL AND AGENT—PURCHASE OF GOODS BY AGENT—AUTHORITY—RECOGNITION AND ACQUIESCENCE—REPRESENTATIONS OF GENERAL MANAGER—ESTOPPEL. Where goods were sold to one claiming to be an agent of the defendant, and the vendor twice made inquiry at defendant's office and was referred to a certain room, supposed to be a department of defendant's business, and was there each time assured that the goods would be paid for by defendant as agreed by the agent, the defendant, upon his return from abroad, cannot escape liability for the goods by showing that they were purchased for an incorporated company doing business in said room, in which defendant was only a stockholder, and that defendant's general manager in charge of his business did not know that the company had been incorporated.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 12, 1904, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action upon account for goods sold and delivered. Affirmed.

Walter A. Keene, for appellant.

J. D. Bauer and Smith & Cole, for respondents.

RUDKIN, J.—Between the 27th day of February and the 7th day of May, 1903, the defendant Furuya furnished to the Northern Pacific Railway Company a number of Japanese laborers, who were engaged in the construction of a drainage ditch for the railway company, near Wickersham,

¹ Reported in 81 Pac. 98.

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Opinion Per RUDKIN, J.

in Whatcom county. The railway company paid Furuya for the laborers so furnished, and Furuya in turn paid the laborers direct. Among these laborers was one Matsumoto, called a bookman. The authority or duty of this bookman is not clear from the testimony, further than that he transmitted orders from the railway foreman to the Japanese laborers, many of whom could not speak or understand the English language.

Between the 27th day of February and the 28th day of March, 1903, the plaintiffs in this action sold and delivered to said Matsumoto, for the laborers above mentioned, goods, wares, and merchandise, of the value of \$250, Matsumoto representing to the plaintiffs, at the time of sale, that he was the agent of the defendant Furuya, and that Furuya would pay for the goods so furnished at the end of the month. About the end of the month, the account not having been paid, Haner, one of the plaintiffs, called at the store room of the defendant Furuya, in the city of Seattle, and made inquiry in regard to the payment of this account. He was referred to room 7 upstairs, and there inquired for the agent of the defendant Furuya. A person in charge of the office responded to his inquiry, and Haner informed him of the nature of the account, and the circumstances under which the goods were sold to Matsumoto. Haner was assured that the account was all right, and would be paid by Furuya at the end of the month. With this assurance, Haner returned home, and the plaintiffs continued to furnish goods to Matsumoto until the account run up to the amount set forth in the complaint. About the latter part of April, one of the plaintiffs' employees again called at the place of business of the defendant Furuya, in regard to the account, and was again referred to room 7 upstairs. He was there informed that the books were not ready. The sale of the goods to Matsumoto, their value, and the nonpayment of the account are admitted. The only question at issue was the agency of Matsumoto, or his authority to bind the defendant

Furuya. The court below found in favor of the plaintiffs, and entered judgment accordingly. From this judgment, the defendant Furuya appeals.

Counsel for appellant, in an affidavit filed in support of a motion for a new trial, and in his argument in this court, frankly admits that he assumed, throughout the trial in the court below, that room 7 above the appellant's store room, to which the respondents were referred for information relating to the account in suit, was in fact one of the departments of the appellant's business. The court below so assumed and so found, and this finding is amply supported by the testimony. If this were true, there can be no question that the authority of Matsumoto was so far recognized and acquiesced in by the authorized representatives of the appellant that it would be a gross fraud to now permit the appellant to repudiate his acts.

The main contention of the appellant appears to be that he filed certain affidavits in support of his motion for a new trial, which were not controverted, and that this court should assume the facts stated in these affidavits to be true, or order a new trial. From these affidavits it appears that the contract under which the appellant furnished laborers to the railway company was assigned to a corporation, known as the "Construction and Maintenance Company," on the 2d day of March, 1903, and that room 7 upstairs, to which the respondents were referred, was in fact the office of the Construction and Maintenance Company, and that the appellant had no connection therewith except as a stockholder in the corporation.

While counsel was perhaps excusable in not ascertaining these facts before the trial, the appellant and his general manager were not. It is true, the appellant was absent in Japan, and his general manager made affidavit that he did not know that the Construction and Maintenance Company was a corporation, until after the trial. But this general manager had full charge of all business of the appellant

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during his absence, and was bound to know whether room 7 was a department of the appellant's business and under his control, or the office of a separate and independent concern. The fact that the manager claims that he did not know the connection between the appellant's business and said room 7, until after the trial, convinces us that there was such recognition of Matsumoto's agency as is claimed by the respondents, and the appellant is now estopped to controvert or deny it. There is no error in the findings or judgment of the court, or in the order denying the motion for a new trial, and the judgment is accordingly affirmed.

MOUNT, C. J., HADLEY, FULLERTON, DUNBAR, CROW, and ROOT, JJ., concur.

(No. 5667. Decided June 14, 1905.)

E. DEMPSIE, *Appellant*, v. F. L. O. DARLING *et al.*,
Respondents.¹

NUISANCE—INJUNCTION TO ABATE DISORDERLY HOUSE—ADJOINING PROPERTY NOT OCCUPIED—COMPLAINT—SUFFICIENCY. Injunction lies to abate the maintenance of a bawdy house as a public nuisance specially injurious to plaintiff's vacant adjoining property, where it is alleged that plaintiff intends to at once build thereon for residence purposes; and, upon demurrer, such allegation sufficiently shows the certainty of damage to authorize injunction; the remedies at law being inadequate.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 18, 1905, dismissing an action to abate a nuisance, upon sustaining a demurrer to the complaint. Reversed.

Harris Baldwin, for appellant.

Henley & Kellam, and *Sullivan, Nuzum & Nuzum*, for respondents.

¹ Reported in 81 Pac. 152.

DUNBAR, J.—The complaint in this case alleges, in substance, that the appellant owns a parcel of vacant ground, in the city of Spokane; that contiguous to this ground is a house and lot owned by the respondent Philadelphia Securities Company; that the house has three stories; that the respondent Philadelphia Securities Company, for a long time has been, and is, renting the second and third stories of the house to respondent F. L. O. Darling, as and for a house of ill fame, and for the purpose of enabling her, as proprietress, to conduct a house of prostitution therein, and to enable her to have and harbor therein prostitutes and lewd and abandoned women for the purposes of prostitution; that, pursuant to said purpose, the said respondent F. L. O. Darling has been, and is, conducting a house of prostitution in the second and third stories of said house, and that prostitution has been, and is, practiced in the second and third stories, by the said proprietress and the other respondents, who are lewd and abandoned women, and reside therein; that it is the wish and purpose of appellant to build at once upon his said vacant ground a house, to be by him devoted to and occupied for some respectable and lawful purpose; that, by reason of the conducting of a house of prostitution in the aforesaid second and third stories of said house, and the presence of prostitutes therein, any house which appellant might build upon his ground would be undesirable for any lawful use, and he could not occupy it or rent it for any lawful purpose; and that, by reason of the facts above stated, his ground is being continuously and irreparably damaged by diminution in value; and an injunction was prayed for. The respondents interposed a demurrer, to the effect that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the appellant having refused to plead further, a final judgment of dismissal of the action was rendered in favor of respondents, from which judgment this appeal is taken.

We think the court erred in sustaining the demurrer to

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this complaint. It is contended by the respondents, in sustentation of the action of the court, that, inasmuch as the plaintiff's lot was a vacant lot, and that a house had not already been built upon it which would be affected by the nuisance complained of, the damages are, therefore, too remote and speculative; that the plaintiff has not yet built upon said lot, and that he may never do so. But the allegation of the complaint is to the effect that it is the purpose of the plaintiff to build at once upon this lot a house for the purpose of lease or rent for some reputable and lawful purpose; and it would seem unreasonable to compel the plaintiff to wait until he had been to the expense of constructing a house and advertising the same for rent for a reasonable time before applying to the courts for a remedy which would necessarily, in the natural process of litigation, be delayed for a considerable length of time, thereby depriving him of a right to which he is entitled, viz., to enjoy the use of his property without hindrance through the operation of a nuisance.

It may be conceded at the outset that, when a party seeks the aid of a court of equity by injunction, he must show not only clear legal or equitable right, but, also, a well-grounded apprehension of immediate injury to his rights; and that, where no necessity is shown for the injunction as a means of protection to such rights, it should not be granted. But it seems to us that the immediate injury is sufficiently set forth in the complaint under consideration.

The case of *Dana v. Valentine*, 5 Met. (Mass.) 8, cited by respondents, and which it is claimed is exactly in point, seems to us not to reach the case under consideration at all. There, it is true, the court used the following language, quoted in appellant's brief, viz.:

"Upon no principle of equity can the court interpose in their favor, by injunction on the defendant to desist from carrying on his trade; there being no certainty that dwelling houses will ever be erected on these premises: Or, if there

should be, it is uncertain when such erections may be made. To require this extraordinary relief, the injury complained of must actually exist, or the danger must appear to be certain and immediate, and not depending on any contingency. We think it therefore very manifest, that these owners of vacant lots have made out no title to the interposition of a court of equity."

An examination of that case, however, reveals the fact that that action was brought against the defendant, both by the owners of vacant lots and by the owners of buildings adjacent to the alleged nuisance, which was the business of manufacturing soap and candles, and of slaughtering cattle; and the injunction was denied on two grounds, viz.: first, that the plaintiffs, if they had been injured, had a complete and adequate remedy at law; and second, that the defendant had made out a good prescriptive right and justification. So that, in any event, the complaint of the parties who owned the vacant lots would have failed under the general ruling of the court on the two propositions just above mentioned, and what was said in relation to them was purely without the case. But, in any event, their right to relief was denied specially upon the ground that they had a complete and adequate remedy at law, and that an action at law for the recovery of damages for the diminution of the value of their lands by the nuisance alleged was available to them, there being no certainty that any dwelling houses would ever be erected upon the premises, or, if they should be, when such erections would be made, and that equity would not reach beyond these contingencies to afford relief.

But, as we have before noticed, so far as the certainty of the building is concerned, and also the certainty of the time, the allegation of the complaint, which must be taken to state the truth, is to the effect that the building will be erected at once. And as to the second proposition there decided by the court, that an action for damages was the only resort of the plaintiffs (the owners of vacant lots), that question

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was decided adversely to the respondents' contention by this court in *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, where it was held that injunction lies to abate the maintenance of a bawdy house as a public nuisance specially injurious to plaintiff's adjoining property used for residence purposes, the common law remedies of indictment and action on the case being inadequate, and that this rule has not been changed by statute in this state. The above conclusion was reached after a lengthy and evidently painstaking investigation of the law and an investigation of the authorities, ancient and modern, on this subject; and puts at rest the contention made by the respondents that the remedy by injunction was not open to the plaintiff in this case if the petition in other respects stated a cause of action.

The respondents also cite 1 High, Injunctions, § 774, where it is said by that author:

"To justify a court of equity in enjoining a nuisance of the class under consideration, the person aggrieved must show to the court some actual, substantial damage and not merely a remote, contingent, or prospective injury."

But the preceding section discloses the *class* under consideration. The author there was discussing injunctions which were asked for against the operation of legitimate businesses, such as the burning of brick, the erection of a chandlery, or of slaughter houses, or of livery stables, or the operation of lime kilns or gas works—businesses that were in themselves lawful enterprises which the government is anxious to foster under proper regulations and locations. But the nuisance complained of in this case is of an entirely different character. It is degrading, immoral, indecent, and always under the ban of the law, and courts ought not to be too exacting with citizens who are asking relief from such impositions upon their rights. An examination of the other cases cited by respondents shows that they are not applicable to the

facts stated in this complaint, as construed by the decision of this court in *Ingersoll v. Rousseau*, *supra*.

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.

MOUNT, C. J., ROOT, CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

(No. 5309. Decided June 30, 1905.)

J. W. SNIDER *et al.*, *Respondents*, v. FRED BADERE *et al.*,
Defendants, MITCHELL, LEWIS & STAVEL
COMPANY, *Appellant*.¹

JUDGMENT—VACATION—APPEAL—RECORD—FAILURE TO SHOW WANT OF JURISDICTION. Upon appeal from a judgment entered upon findings of fact and conclusions of law, regular on its face, and apparently entered upon the service of due process, it will be presumed that the court acted within its jurisdiction where the appellant brings up in the record only the summons, affidavit of service, decree, notice of appeal, and motion to vacate for defects in the summons, and fails to show affirmatively that the court acted without jurisdiction, there being nothing to show that it was a default judgment, or that there was no appearance or no subsequent summons.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered May 7, 1904, upon findings in favor of the plaintiffs, in an action upon contract. Affirmed.

Shank & Smith and *H. C. Belt*, for appellant.

W. D. Lambuth, for respondents.

PER CURIAM.—This is an appeal of defendant Mitchell, Lewis & Stavel Company, from a judgment alleged to have been taken by default against it, the contention being that the summons served was not definite enough to give the court jurisdiction over the persons of the defendants. This

¹ Reported in 81 Pac. 302.

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Opinion Per Curiam.

question, however, as we view the law governing this case, it is not necessary to decide. The appellant has brought here only the summons, affidavit of service, decree, and notice of appeal. The decree, after the entitling of the cause, is as follows:

"This cause coming on this day, on motion of plaintiffs for judgment and decree in accordance with the finding of facts and conclusions of law made and filed herein, and the court being now fully advised, grants said motion. Wherefore, it is by the court considered, adjudged, and decreed that plaintiffs have judgment against the defendants," etc.

It is well established that every intendment will be brought to bear to sustain a judgment which is regular on its face, and, in the absence of a showing to the contrary, the presumption will be that the court acted within its jurisdiction. There is nothing in this record to show that the judgment was a default judgment, or that subsequent summons might not have issued, or that the parties defendant did not appear. If the summons was not sufficient to give the court jurisdiction, it might well be that one of the findings of fact spoken of by the court was a finding to the effect that the defect in the summons had been cured by the appearance of the defendants. Those findings are not before this court, and the language of the court indicates that the judgment was based upon regular proceedings; and, in the absence of a showing to the contrary, this court will not presume that the trial court acted without jurisdiction.

A supplemental record, however, has been filed by the appellant, evidently with the intention of curing the want of a necessary showing of lack of jurisdiction in the record, to the effect that the defendant, appellant here, moved for the vacation of the judgment for the reason that the summons upon which said purported default judgment was rendered was insufficient to give jurisdiction to the court to render any personal judgment against the defendant. But,

if the appellant relies upon this supplemental record, its showing is also in this regard absolutely insufficient, for not only does it fail to set forth a default judgment, but there is no record presented here which would indicate that the court had denied the motion to vacate, the supplemental record simply setting forth the affidavit of service of the motion, the motion to vacate, and the motion to quash the pretended service of the summons. The appellant, having failed to affirmatively show that the judgment of the court—which is regular upon its face and the recitals of which indicate that it is based upon jurisdiction—was actually rendered without jurisdiction, cannot prevail upon this appeal.

The judgment is affirmed.

(No. 5637. Decided July 1, 1905.)

39 133
440 537

THE STATE OF WASHINGTON, *on the Relation of C. Victor Martin, Judge etc., Respondent*, v. E. K. PENDERGAST, *Prosecuting Attorney of Okanogan County, Appellant*.¹

APPEAL—BOND—AMOUNT—SUFFICIENCY. Where, upon an appeal from a judgment of contempt, the court fixed the amount of the supersedeas bond, which was given before the journal entry of judgment, a subsequent appeal from the judgment cannot be dismissed for insufficiency of a second bond in the sum of \$200, when such bond was not conditioned to effect a stay, but only as an appeal bond.

CONTEMPT—PARTIES—PRESIDING JUDGE—APPEAL—DISMISSAL. The trial judge is not a proper party to a proceeding for contempt in a court over which he presides, and when joined an appeal from the judgment will be dismissed as to him.

COURTS—JURISDICTION—PROCESS—ORDERS FORBIDDING PAYMENT OF COURT STENOGRAPHER. An order of the superior court, not made in any action or proceeding, and without pleading or process, forbidding the payment of county warrants for stenographer's fees in cases pending in such court, is void.

¹Reported in 81 Pac. 324.

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Opinion Per RUDKIN, J.

CONTEMPT—VOID ORDERS. Advising the violation of a void order is not contempt of court.

CONTEMPT—PROSECUTION—AFFIDAVIT—NECESSITY OF. A contempt committed without the presence of the court can only be prosecuted by affidavit stating the facts constituting the contempt.

CONTEMPT — SUMMARY PUNISHMENT — JUDGMENT — RECITATION OF FACTS—SUFFICIENCY—ORDER TO APOLOGIZE TO COURT—VALIDITY. A judgment of contempt reciting that an attorney refused to obey an order of the court requiring him to apologize to the trial judge, cannot be upheld as a summary punishment of a contempt committed in the presence of the court, since such judgments must, under Bal. Code, § 5800, recite the facts constituting the contempt, and it was not contempt to refuse to apologize, such order exceeding the authority of the court.

Appeal from a judgment of the superior court for Okanogan county, Martin, J., made September 27, 1904, adjudging the appellant guilty of contempt of court, upon his refusal to comply with an order to apologize. Reversed.

E. W. Taylor and *E. K. Pendergast*, for appellant.

C. Victor Martin and *Ira Thomas*, for respondent.

RUDKIN, J.—This is an appeal from the following order or judgment of the superior court of Okanogan county:

“It is hereby ordered, adjudged and decreed, that the clerk of this court enter this order, showing that on the 27th day of September, A. D. 1904, the said Honorable C. Victor Martin, while sitting as the presiding judge of this court, in open court, announced to said defendant that, unless he, the said defendant, apologized to him, the said Hon. C. Victor Martin, as such judge of said court, that he, the said defendant, would be in contempt of court, and the said defendant failing and refusing to apologize, the said Hon. C. Victor Martin then pronounced this judgment and sentence against the said defendant, to wit: That said defendant E. K. Pendergast pay a fine of \$50, and that he, the said defendant, be suspended from the practice of law in this court until said fine was paid, and said apology made.”

The respondent moves to dismiss the appeal, on the ground that no sufficient appeal bond was given or filed. The order appealed from was made orally, on the 27th day of September, 1904. The appellant immediately gave notice of appeal therefrom, and applied to the court to fix the amount of the supersedeas bond pending the appeal. The court fixed the amount of such bond in the sum of \$200, and on the same day a bond in the sum of \$400, conditioned as both a cost and a supersedeas bond, was filed. No written entry of the order was made or filed for record until the 21st day of December, 1904. On the 26th of December, 1904, a second notice of appeal was given from the order as entered on the 21st inst., and a cost bond in the sum of \$200 was filed on the same day. The motion to dismiss is based on the insufficiency of this second bond.

Counsel for respondent state in their motion that the bond is conditioned both as an appeal and a supersedeas bond, and is in an insufficient amount. But in this they are in error. The bond makes no reference whatever to a supersedeas, and is conditioned only for the payment of the costs and damages that may be awarded against the appellant, on the appeal or the dismissal thereof, as prescribed by Bal. Code, § 6505. The bond is therefore sufficient, and we are not called upon to decide whether any appeal bond is necessary on an appeal of this character. The motion to dismiss the appeal on the ground of the insufficiency of the bond is therefore denied.

The respondent Martin further moves to dismiss the appeal as to him, on the ground that he was improperly made a party to the proceeding. The statute provides, Bal. Code, § 5803, that in all cases of public interest the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced on the relation of a private party, such party shall be deemed a coplaintiff with the state. The presiding judge is in no case a proper party to a proceeding for contempt in the court

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over which he presides; and, as to the respondent Martin, the motion to dismiss must be granted.

Little need be said on the merits of the appeal. It appears that a controversy arose between the judge of the superior court of Okanogan county, and the county commissioners and county attorney thereof, over the employment of a stenographer to report the testimony in criminal cases pending in said court. On the 12th day of January, 1904, the board of county commissioners of said county adopted a resolution denying the authority of the superior judge to employ a stenographer in such cases at the expense of the county, and refusing to defray the expenses thereof. On the 17th day of May, 1904, the judge of the superior court made an order forbidding the county auditor and his deputies to issue any warrant or warrants in payment of the services of stenographers performed in such cases. On the 27th day of September, 1904, said court was engaged in the settlement of a statement of facts in a certain criminal case therein pending. In the course of the proceedings it developed that the statement of facts had been prepared by a stenographer at the expense of the county, and that the county auditor had paid for such services by warrant. The court thereupon directed the appellant, as prosecuting attorney of the county, to investigate the matter and, if he ascertained that the county auditor had issued warrants in violation of the above order of May 17, to proceed against him as for a contempt. The appellant was further directed to report to the court by seven o'clock that evening. At seven o'clock the appellant reported in writing to the effect that, in his opinion, the order of May 17 was null and void, and that he could not conscientiously make the necessary affidavit or prosecute the auditor for contempt. A somewhat heated controversy thereupon took place between the presiding judge and the prosecuting attorney, which resulted in the making of the order appealed from.

The appellant contends that he was adjudged guilty of

contempt for counseling and advising a violation of the order of the court of May 17, above referred to, and that the judgment against him is erroneous for several reasons: First, because no such contempt is shown by the record; second, because the order of May 17 was a nullity, and no contempt could arise from a violation thereof; and third, because such contempt, if any, could only be prosecuted by affidavit. Passing over the first reason assigned, the second and third are no doubt well grounded. The order of May 17 was not made in any pending action or proceeding. There was no pleading, no process, and no pretense of jurisdiction to make the order. Again, if counseling a violation of such order were a contempt at all, it was a contempt committed without the presence of the court, and could only be prosecuted by affidavit. *In Re Coulter*, 25 Wash. 526, 65 Pac. 759.

The respondent, on the other hand, contends, that the appellant was guilty of a contempt committed in the immediate view and presence of the court, and was summarily punished therefor. Should we adopt this view, it would not aid the cause of the respondent. Under Bal. Code, § 5800, when a party is guilty of a contempt committed in the immediate view and presence of the court, he may be punished summarily therefor, but "an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein provided." By the next section, in all other cases the facts constituting the contempt must be brought to the attention of the court by affidavit. In every case of contempt, therefore, the facts constituting the alleged contempt must appear of record, either in the order made or in the affidavit filed. It requires no argument to show that the facts recited in the order appealed from do not constitute a contempt. An attorney is under no obligation to apologize to a court under any circumstances, and the court exceeds its

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authority whenever it makes such a demand. *State ex rel. Rohde v. Sachs*, 2 Wash. 373, 26 Pac. 865, 26 Am. St. 857. The respondent concedes that so much of the order as attempts to suspend the appellant from the practice of the law is void, and we will not discuss that question. *State ex rel. Rohde v. Sachs, supra*.

The judgment of the court below must therefore be reversed, with directions to dismiss the proceeding.

MOUNT, C. J., DUNBAR, ROOT, CROW, FULLERTON, and HADLEY, JJ., concur.

No. 5574. Decided July 5, 1905.)

J. W. A. NICHOLS, *Appellant*, v. SCHOOL DISTRICT No. 10,
OF PIERCE COUNTY, *et al.*, *Respondents*.¹

SCHOOLS AND SCHOOL DISTRICTS—PURCHASE OF BUILDING SITES—ULTRA VIRES. Under Bal. Code, § 2367, the board of directors of school district No. 10, Pierce county, has authority to purchase a site for a high school building for the sum of \$32,000, when it did not exceed the constitutional limit of indebtedness of the district.

SAME—RATIFICATION OF PURCHASE OF SITE—ELECTION AUTHORIZING ERECTION OF SCHOOL BUILDING. An illegal or invalid purchase of a high school site by a school district board is impliedly ratified by a vote of the district at a special election, authorizing the building of a high school thereon and the issuance of bonds therefor.

SAME—SPECIAL ELECTIONS FOR BONDS—CONDUCT OF—REQUISITES. Bal. Code, §§ 2398-2405, prescribing the method of conducting special school elections for the validation of illegal indebtedness, is a special act and has no reference to an election to authorize the issuance of bonds for the purpose of erecting a high school building.

SAME—CANVASS OF VOTES—EFFECT—REVIEW BY COURTS. In a proceeding for an injunction to restrain the issuance of school district warrants, authorized at a special election for the purpose of erecting a high school building, the final return of the canvassing board, declaring the result, after canvassing the votes, regularly made and not impeached for fraud, nor attacked in any proceeding to obtain a review thereof, is final and conclusive on the courts as to the number of votes cast.

¹ Reported in 81 Pac. 325.

Appeal from a judgment of the superior court for Pierce county, Rice, J., entered November 12, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the issuance of school district warrants. Affirmed.

John C. Stallcup and *H. W. Lueders*, for appellant.

F. Campbell, for respondents.

CROW, J.—This is an action commenced by appellant, a taxpayer, against the board of directors of school district No. 10, of Pierce county, Washington, and John B. Reed, as county treasurer, to enjoin the issuance and sale of \$200,000 of school district bonds. From a judgment of dismissal, an appeal has been taken.

The record shows that said school district has for many years owned and used for high school purposes a certain building, situated on Tacoma avenue, in the city of Tacoma, and that, on March 11, 1903, said district contracted for, and purchased, a tract of land known as the "Tourist Hotel property," agreeing to pay therefor the sum of \$32,000, and immediately issued a warrant for \$16,000, as part payment. Afterwards, on March 18, 1903, the board of directors duly called a special school election, for the purpose of submitting to the voters of said district a proposition to issue bonds in the sum of \$200,000, \$35,000 to be used for the purchase of said Tourist Hotel site, and \$165,000, for the purpose of erecting a high school building thereon. An election was held in pursuance of this call, on April 18, 1903, at which time the proposition to issue said bonds was defeated. Afterwards, on July 7, 1903, the board of directors issued a second warrant, in payment of the balance due for the purchase of said Tourist Hotel site. On March 2, 1904, by an amended resolution adopted by said board of directors, it was determined to call a special

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election to be held on April 23, 1904, for the purpose of voting upon the following propositions:

- (1) Shall Tacoma school district No. 10, in Pierce county, Washington, borrow money and issue and sell bonds of said school district therefor, to run for a period of twenty years, in the amount of \$200,000, the proceeds of said bonds to constitute a special fund, \$100,000 thereof to be used for the erection of a high school building, and \$100,000 to be used for the erection and improvement of other buildings?
- (2) Shall said district build a high school on the site known as "the Tourist Hotel property?"
- (3) Shall said district build a high school on the present Tacoma avenue site?
- (4) Shall said school district sell the present Tacoma avenue high school property?
- (5) Shall said school district sell the Tourist Hotel property?

Thereafter, on the 23d day of April, 1904, said election was held, and on April 26, 1904, the board of directors met with C. E. Griffin, justice of the peace, in Tacoma precinct, Tacoma, Washington, as a canvassing board, and duly canvassed the result of said election as required by law; the certificate made and filed by said canvassing board being as follows:

"We the undersigned members of the board of directors, Tacoma school district No. 10, having met to canvass the results of the special election held Saturday, April 23, 1904, for the purpose of voting on the following propositions, to wit: [here follow propositions 1, 2, 3, 4 and 5 just described] hereby certify that the whole number of ballots cast for the first proposition was 2,136; 'yes' receiving 1,349 votes; 'no' receiving 787 votes;

"That the whole number of ballots cast for the second proposition was 2,063; 'yes' receiving 1,062 votes, and 'no' receiving 1,001 votes;

"That the whole number of ballots cast for the third proposition was 1,935; 'yes' receiving 840 votes, and 'no' receiving 1,095 votes;

"That the whole number of ballots cast for the fourth

proposition was 2,038; 'yes' receiving 872 votes, and 'no' receiving 1,166 votes;

"That the whole number of ballots cast for the fifth proposition was 2,074; 'yes' receiving 957 votes, and 'no' receiving 1,117 votes.

"We hereby declare that proposition No. 1 'Bonds, yes' carried, having received the requisite three-fifths majority of all the votes cast. And proposition No. 2 having received a majority of all the votes cast, we declare carried. Propositions 3, 4 and 5, having failed to receive a majority of all the votes cast for the respective propositions, we hereby declare them lost."

Thereafter the officers provided by law proceeded to advertise for bids for said bonds in the sum of \$200,000, and on June 10, 1904, the bid of Rudolph Kleybolte & Co., being the highest and best bid received, was accepted, and said board was about to issue said bonds when this injunction proceeding was commenced.

Numerous assignments of error are presented, but we think many of them without sufficient foundation to necessitate their discussion herein, and we will only discuss those of controlling importance. It is contended by appellant that the act of the school directors in purchasing said Tourist Hotel site was *ultra vires*, and also in direct contravention of the order of the voters of said school district as expressed at said first election held on the 18th day of April, 1903; also, that in making said purchase, the said district exceeded its constitutional limit of indebtedness.

We are of the opinion that the act of said board was not *ultra vires*; that full authority for said purchase is given by § 97 of the code of education, 3 Bal. Code, § 2367; and that the appellant has failed to clearly show by the evidence that, when said school district made said purchase and issued warrants therefor, it did in fact exceed its constitutional limit of indebtedness. Were we to assume, however, that said purchase was in the first instance illegal, invalid, or *ultra vires*, nevertheless, at the second election held on the

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23d day of April, 1904, and which we hold to have been valid, the act of said district in making said purchase was impliedly ratified, for the reason that by the vote of said district the board was instructed to build a high school upon said site, and not to sell the same.

It was contended by appellant upon the trial, and is contended here, that sufficient and legal notice of said election of April 23, 1904, had not been given by said board of directors. We have carefully examined the complaint, and fail to find that appellant has alleged any such want of notice. But even had such defect been properly pleaded, the record shows said election to have been regularly and legally called, and the trial court found it to have been duly held, pursuant to said resolution of said board and notice thereof given as required by law.

Appellant urges many alleged irregularities in the conduct of said election, such as improper ballots, want of election booths, etc., apparently contending that this election should have been called and held under Bal. Code, §§ 2398-2405. An examination of these sections, however, will show that they constitute a special act originally passed in 1895, Laws 1895, p. 26, relating only to the validating and ratifying of illegal indebtedness, afterwards incorporated into the code of education; whereas, this election was called, not to validate or ratify an illegal indebtedness, but to confer upon the board authority to issue bonds to raise funds with which to erect school buildings, including a high school.

Appellant also contends that the trial court erred in not ordering a production of the ballots cast, and the poll books kept at said election, so that the court might ascertain whether the certificate made by the canvassing board was correct, and whether said board was justified in finding that the bonds had been actually authorized by a three-fifths vote. It is conceded by appellant that no statutory provision has been made for any contest of an election of this character, after canvass by the board of directors. Re-

spondents contend that the action of such board is final, relying upon the authority of *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, and *Heffner v. County Com'rs*, 16 Wash. 273, 47 Pac. 430.

In *Parmeter v. Bourne*, *supra*, it appears that, at the general election held in November, 1892, there had been submitted to the electors of Pacific county a proposition to remove the county seat from Oysterville to South Bend; that afterwards the votes had been canvassed by the board of county commissioners, and that said board had declared said county seat to have been removed from Oysterville to South Bend. The appellant, a citizen and taxpayer of Oysterville, brought action to vacate the order of the county commissioners, and to obtain an injunction restraining the defendants from removing the public records. This court held, in substance, that the superior court had no jurisdiction of the subject-matter of the action which sought to enjoin such removal, for the reason that the action of the board of canvassers in declaring the result of said election was final, no contest being provided for by statute.

In *Krieschel v. County Com'rs*, 12 Wash. 428, 41 Pac. 186, the facts show that, at the general election held in November, 1894, a proposition was submitted to the voters of Snohomish county to remove the county seat from Snohomish to Everett; that, after the election was held, the board of county commissioners, without having actually canvassed the vote, declared the city of Everett to be the county seat from and after January 1, 1895. Krieschel, a taxpayer, commenced the action to enjoin the removal of said county seat, and Anders, J., in writing the opinion, distinguished the case of *Parmeter v. Bourne*, for the reason that in the *Snohomish* case it appeared that the board, as a matter of fact, had not met as a board of canvassers and discharged its duties as required by law, and that for said reason a court of equity could interfere and enjoin such removal. Afterwards, however, the board of county com-

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missioners did meet as a canvassing board, and did canvass said returns, and in so doing refused to count certain votes cast in Port Gardner in favor of removal, and also refused to count two hundred votes returned from South Snohomish against removal. After canvassing the returns, the board declared Everett to have been chosen as county seat, and again adopted a resolution providing for such removal. To prevent this removal, the action reported in *Heffner v. County Com'rs*, *supra*, was instituted, and in that case this court, following *Parmeter v. Bourne*, again held that, as the board had met and canvassed the vote and had discharged its duties, its action was final, and a court of equity could not interfere by injunction.

As above stated, respondents herein rely upon these authorities in support of their proposition that the action of the canvassing board was final. Appellant, however, contends that a distinction exists between this case and said cases from Pacific and Snohomish counties, for the reason that the questions there submitted at said election were political in their character whereas the questions here submitted were not political, but called for the incurring of indebtedness and imposing additional taxation. We do not pass upon the question as to whether there is any merit in this suggestion, but are of the opinion that, under the peculiar facts of this case, the principles laid down in the cases above cited should apply, and that the action of the canvassing board herein is final. We do not undertake to say that in no instance could inquiry be made into the final action of a board of canvassers, upon an election of this character. It might be that, in cases of fraud, of utter failure to discharge duty, or of malfeasance, such inquiry might be made by a court of equity, or by some proper proceeding instituted for the purpose of obtaining a review of the action of such board. An examination of the complaint shows that the appellant has utterly failed to allege facts sufficient to constitute fraud, failure to dis-

charge duty, or malfeasance in office, upon the part of the board of directors herein when sitting as a canvassing board, and for this reason we think the action of the trial court in refusing to go behind their certificate was proper.

Some question has been raised by the appellant herein as to whether the bonds actually carried by a three-fifths vote. Upon an examination of the record, we think it sufficiently appears that the necessary vote was obtained upon all propositions declared to have been carried.

We find no error in the record, and the judgment is affirmed.

MOUNT, C. J., ROOT, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

(No. 5649. Decided July 10, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. JOHN MANN,
Appellant.¹

CRIMINAL LAW—TRIAL—WITNESSES—EXCLUSION OF CODEFENDANT FROM ROOM. The exclusion from the court room of one jointly informed against with defendant, together with all other witnesses whose names were indorsed as witnesses for the state, is not prejudicial error, where, upon the conclusion of the opening statement of the prosecuting attorney, such codefendant was permitted to return and remained throughout the trial, and there is no claim that prejudice resulted.

CRIMINAL LAW—JOINT COMPLAINT AGAINST HUSBAND AND WIFE—CONSPIRACY—ARSON—INFORMATION—SUFFICIENCY. The information charging the defendant with aiding and abetting his wife in the commission of arson, is not insufficient in that it attempts to charge a conspiracy by a husband and wife, since it charges a consummated offense and not a conspiracy to commit an offense.

EVIDENCE—BEST AND SECONDARY. Oral evidence of the contents of an insurance policy is admissible when the policy is in the possession of the accused and on demand he fails to produce it, although the witness made a record of its contents and was compelled to refer thereto to refresh his memory.

¹Reported in 81 Pac. 561.

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TRIAL—EVIDENCE—CROSS-EXAMINATION OF WITNESS. It is improper to ask upon cross-examination if the witness is not the "notorious R who was tarred and feathered at G."

CRIMINAL LAW—ARSON—EVIDENCE—SHIPPING GOODS FROM BUILDING—TIME—RE MOTENESS. Upon a prosecution for arson, evidence that the accused shipped merchandise from the building, five and seven days before the fire, is admissible to show motive and to connect the accused with the crime, its remoteness in point of time only lessening its force.

CRIMINAL LAW—EVIDENCE—ADMISSIONS—VOLUNTARY. Evidence of admissions made by the accused to officers while in custody are admissible without a direct statement that they were not made under the influence of fear produced by threats, when it appears from all that occurred that they were voluntarily made.

CRIMINAL LAW—EVIDENCE—ADMISSIONS—CONSPIRACY. Upon a prosecution of a husband and wife for a consummated offense of arson, admissions of the wife, implicating the husband, are not objectionable as an admission of one conspirator made after the conspiracy is at an end, since the rules relating to conspiracy have no application.

SAME—PRINCIPAL AND ACCESSORY—ADMISSIONS—BY PRINCIPAL. In a separate prosecution of a husband as accessory to the crime of arson committed by his wife, admissions made by the wife implicating him are admissible in evidence, if they would have been competent against her, since it is incumbent on the state to prove her guilt.

SAME—HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS. Such admissions are not objectionable as permitting the wife to testify against the husband, voluntary confessions not being within the rule of privileged communications.

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of a letter in evidence is harmless, when its contents had been previously testified to without objection.

APPEAL—REVIEW—VERDICT. The weight and credibility of the evidence is entirely for the jury and trial judge, and their decision is conclusive on the supreme court.

TRIAL—COMMENT ON EVIDENCE. It is not unlawful comment on the evidence, within the meaning of the constitution, for the trial judge, upon ruling on the admissions of evidence, to reply to suggestions of counsel, respecting the value of reputation, that it may be lost in a minute.

Appeal from a judgment of the superior court for Lewis county, Chapman, J., entered October 31, 1904, upon a trial and conviction of the crime of arson. Affirmed.

Frank Burch and *George E. Rhodes*, for appellant.

J. R. Buxton and *C. H. Forney*, for respondent.

FULLERTON, J.—The appellant and one Nettie Mann were jointly informed against for the crime of arson, the charging part of the information being as follows:

"She, the said Nettie Mann, in Lewis county, state of Washington, on to wit: the 17 day of August, A. D. 1904, and within three years prior to the filing of this information, in the county of Lewis, state of Washington, did then and there feloniously, unlawfully, wilfully and maliciously set fire to and burn that certain two story house building, situate in the city of Centralia, Lewis county, Washington, the property of others, to wit: Thomas Cooling and Sarah Cooling: said two story house building being then and there occupied by the said Nettie Mann and John Mann, and he, the said John Mann, though not personally present at the time said building was fired, did in manner and form aforesaid, unlawfully, feloniously, wilfully and maliciously procure, aid, counsel, incite, command and abet the said Nettie Mann to so unlawfully, feloniously, wilfully and maliciously fire and burn the said two story building, contrary," etc.

On being arraigned, the accused pleaded not guilty, and demanded separate trials, which were granted them by the court. The state elected to try the appellant first, and his trial resulted in a verdict and judgment of guilty, from which he appeals to this court.

Taking up the errors assigned in the order they are discussed in the brief of appellant, the first to be noticed is the contention that the court erred in excluding Nettie Mann from the court room, during the opening statement to the jury made by the prosecuting attorney. From the record it appears that, after the jury had been impaneled and sworn, the prosecuting attorney moved that all of the witnesses,

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both for the state and for the defendant, be excluded from the court room during the trial. Among the witnesses for the state whose names were indorsed on the information was Nettie Mann. The appellant's counsel called attention to this fact, and asked that the rule of exclusion be so modified as not to include her. After some colloquy between the appellant's counsel and the court, the court stated, although no objection to her remaining was made on the part of the state's counsel, that the rule applied to her as well as to all of the other witnesses, and she was taken from the court room by the officers who had her in charge, she being then in custody. The prosecuting attorney thereupon made his opening statement to the jury, at the conclusion of which the court announced that, in view of the opening statement, he would modify his ruling in regard to the exclusion of witnesses, in so far as to permit Nettie Mann to be present in the court room during the trial, if she so desired. She was then brought into the court room, and the trial was proceeded with by the introduction of testimony on the part of the state.

This is all that the record shows regarding the matter, but the appellant says that the purpose of the prosecuting attorney in indorsing the name of Mrs. Mann on the information was to enable him to invoke the rule of exclusion against her, and thus deprive him of the benefit of her assistance while on his trial; and he argues that this court ought to set its seal of disapproval on such conduct by refusing to permit a conviction to stand where such a course has been pursued. But we are unable to find in the record anything which justifies this animadversion on the prosecuting attorney. His conduct seems to us in nowise blamable. He did not insist that the witness be excluded, nor did he debate the question, but left it entirely to the discretion of the trial court on the reasons urged by the appellant's counsel. He not only had the right to indorse the name of Mrs. Mann on the information, but, if he be-

lieved that she would prove a material witness for the state, it was his duty to do so. There can be, therefore, no ground for the claim that the appellant was prejudiced by the conduct of the prosecuting officer. Nor was the ruling otherwise erroneous. Whether or not any particular witness shall remain in the court room pending the trial of a criminal cause, rests in the sound discretion of the trial court, to be reviewed only for an abuse of such discretion. Here, it is not even claimed that the appellant was in any manner prejudiced by the action of the court, and it is idle to say that such action is ground for reversal.

It is next assigned that the court erred in refusing to sustain the appellant's objection to the introduction of any evidence by the state, on the ground that the information did not state facts sufficient to constitute a crime. The objection to the information is that it necessarily charges a conspiracy, and that, as the defendants were shown to be husband and wife, they could not be guilty of a conspiracy. But we think the appellant is mistaken as to the charge contained in the information. The information charges a consummated offense, not a conspiracy to commit an offense. And while it may be true that a husband and wife cannot be convicted of having conspired together to commit an offense, yet if they commit an indictable offense, although the offense is the result of a conspiracy on their part, they can be tried and convicted for the consummated offense.

A Mr. Drummond, while on the witness stand for the state, was asked concerning a certain insurance policy issued on the goods of the appellant, and testified to the effect that he had issued a policy on such goods as agent of a New Hampshire company, and that he had kept a record of the policy, as was his custom. He was then asked if he could state, independently of his record, how the insurance was divided on the different articles insured. On answering that he could, he was told to so state. To this the appellant objected on the ground that the record he had kept of the

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policy was the best evidence. The court overruled the objection, and permitted the witness to answer. This ruling is assigned as error. As this question called for the contents of the insurance policy, it is plain that, as between the witness' memory of what it contained and the memoranda of its contents made by him, his memory was the best evidence, even though he had been compelled to use his memoranda to refresh his memory. But perhaps the real objection is that the policy itself furnishes the best evidence of its contents. If, however, we concede that this objection was made, it does not follow that it was error to admit the evidence. The policy was in the possession of the appellant, and secondary evidence of its contents was admissible, after he had been served with notice to produce it and had failed to do so. *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382.

During the cross-examination of witness Rhodes, he was asked the following question: "Are you not the notorious Tuck Rhodes who was tarred and feathered at Grays Harbor and run out of the country?" To this question the state interposed an objection, which was sustained by the trial court. There was no error in the court's ruling. While the latitude permitted a cross-examiner is extensive, it has its limitations. We think it would be too much to say that its bounds extended to questions of this character.

The state was permitted to show, over the objection of the appellant, that the appellant caused to be shipped by rail, from the city of Centralia to the city of Tacoma, certain trunks and boxes, which were found to contain merchandise taken from the building which was afterwards burned. Certain of these shipments were made some seven days before the fire occurred, and certain others some five days before that time, and it is urged that these times were too remote from the time of the fire to render the testimony admissible. But we think the objection unfounded. The evidence was admissible as tending to show motive, and to connect the

appellant with the crime charged. The remoteness of the removal of the goods from the time of the fire might tend to lessen its probative effect, but that was a question for the jury; it did not tend to render the evidence itself inadmissible.

The court permitted the state to show certain inculpatory statements made by the appellant, concerning the crime charged against him, to the officers who had him in custody. It is alleged that this was error, because it was not shown that the appellant was not under the influence of fear produced by threats when he made them. But we think counsel mistakes the evidence. The witness testifying to the statements purported to state all that occurred at the time the admissions were made, and from the whole of his evidence it is made clear that the statements were voluntarily made. The question whether a defendant is under the influence of fear produced by threats, when he makes statements imputing guilt of the crime charged against him, is a mixed question of law and fact, and the proper way to ascertain the fact is to have the witness detail the circumstances surrounding their making, and all that was said and done preliminary thereto which led to their making. From this the court is much better able to judge whether the admissions are admissible under the statutory rule than it would be were a question asked in the words of the statute and the opinion of the witness taken thereon.

Subsequent to the commission of the offense charged in the information, Nettie Mann made certain confessions and admissions with reference thereto which tended to incriminate both herself and the appellant. These were admitted in evidence, over the objection of the appellant, and their admission is assigned here as error. Several reasons are urged against the admissibility of these confessions, but we shall notice but two of them. The first is that the confession of one conspirator, made after the conspiracy has come to an end, cannot be given in evidence as against a joint conspirator. A long list of cases is cited in support of this

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contention, and, undoubtedly, the rule is correctly stated on the case assumed by the appellant. But, as we have before pointed out, the appellant was informed against and tried for a consummated offense, not for conspiring with another or others to commit an offense, and the rules applicable to the admission and introduction of evidence in the one case are not the same as they are in the other. A criminal conspiracy is a combination between two or more persons to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means. No overt act is necessary to constitute the offense, the gist of the offense being the unlawful conspiring together. Hence, in the case at bar, had the charge against the appellant been for engaging in an unlawful conspiracy only, he could well say that the subsequent confessions and admissions of one of the conspirators were not admissible as evidence against him. But here the person whom he now assumes to be a joint conspirator was charged with the commission of a substantive offense, namely, the crime of arson, and the appellant was charged with aiding and abetting her in the commission of that crime. In order to convict the appellant it was necessary for the state to prove the crime as alleged; that is to say, it must show, first, that Nettie Mann committed the crime of arson; and, second, that the appellant aided and abetted her therein. The state, in order to prove the first of the requisites, could resort to any evidence which would have been admissible had Nettie Mann herself been upon trial. This would include her confessions and admissions, as well as any other competent evidence tending to prove the crime as laid.

But it is thought the confessions were inadmissible because they implicated the appellant. Such is not the rule. The jury are ordinarily entitled to confessions as they are made, and in this case to have eliminated from the confessions all references to the appellant would have left them unintelligible and incompetent for any purpose. The authorities, so far as we have been permitted to examine them,

uniformly hold that the acts, declarations, and confessions of the principal are admissible as evidence on the separate trial of the accessory. Mr. Wharton lays down the rule as follows:

"As at common law the conviction of the principal is a condition precedent to the conviction of the accessory, it is necessary, on the trial of the accessory, to put in evidence the record of the conviction of the principal. This record is, however, only *prima facie* proof of the guilt of the principal; and may be impeached by proof that such conviction was erroneous. Judgment must have been entered on the verdict to make the record admissible. The burden of proving that the principal was not guilty is on the accessory, but the accessory is not restricted to proof of facts shown on the former trial. On the other hand, it is admissible for the prosecution to put in evidence facts tending to show the principal's guilt. In most jurisdictions proof of such conviction is by statute no longer necessary in order to convict the accomplice or accessory." Wharton, Criminal Evidence, § 602.

In *Smith v. State*, 46 Ga. 298, it was held that the confessions of the principal felon, as to his own guilt, are competent evidence to show that fact on the trial of the accessory, if they would have been competent had the principal been on trial. In *Self v. State*, 6 Baxter (Tenn.) 244, it was said that, upon the trial of an accessory before the fact, the principal not having yet been convicted, it devolved upon the state to prove that the principal was guilty of the crime charged, as a necessary prerequisite to the conviction of the defendant, and that any evidence was competent for that purpose that would have been competent had the principal been on trial. To the same effect is *Givens v. State*, 103 Tenn. 648, 55 S. W. 1107. In the latter case the court said:

"Many errors are assigned upon the action of the lower court in admitting or excluding testimony. Of these errors the larger and altogether the greatest number are predicated upon the idea that the second count in the indictment, charg-

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ing Givens with being an accessory before the fact, was not good, and should have been quashed. Having, however, held that this count was good, these objections are necessarily removed. For all the testimony which would have been competent to show Dawn, as principal, guilty of murder, if he had been on trial, was equally competent against Givens, thus charged as being accessory before the fact. Dawn, the principal, had already been tried and convicted. In such a case the rule is well settled that when afterwards the accessory before the fact is put on trial the proceedings are to be conducted as if the principal was again on trial, and the case against the accessory will not be gone into until the case against the principal is established. *Self v. State*, 6 Bax., 244. Under this rule confessions of Dawn, though not made in the presence of Givens, under the second count were competent, not to fix guilt on plaintiff in error, but to show the guilt of Dawn and the grade of his offense. *Self v. State, supra; Morrow v. State*, 14 Lea, 484; Wharton's Crim. Ev., Sec. 702; 2 Bishop on Crim. Procedure, Sec. 13."

The appellant was, of course, entitled to have his rights safeguarded by cautions during the course of the trial and by the instructions of the court to the jury, but no complaint is made that the court was delinquent in this respect, and the record affirmatively shows that it was not.

It is next urged that these confessions were inadmissible because it was shown that Nettie Mann was the wife of the appellant, and that to admit her confessions in evidence was to permit the wife to testify against her husband, contrary to the prohibition contained in the statute. But we think this objection is without merit. Voluntary confessions are not within the rule of privileged communications.

A witness for the state was cross-examined concerning her feelings towards the appellant, and stated, in effect, that she disliked him. On her redirect examination she was asked to state the reason for her dislike, and answered that she had received a letter from him making certain statements and, without objection on the part of the appellant,

repeated them to the jury. She was then asked to produce the letter and did so, whereupon the state was permitted to put it in evidence over the objection of the appellant. It is contended, we think correctly enough, that the letter was inadmissible, but we do not think it reversible error. Its contents had been stated by the witness without objection, and the prejudice produced thereby, if any, could not have been enhanced by reading the letter.

It is next contended that the court erred in overruling the appellant's motion for nonsuit, and his challenge to the sufficiency of the evidence. But a perusal of the record convinces us that there was abundant evidence to sustain the verdict, and this is as far as we have any right to go into the question. The weight and credibility to be given the evidence is entirely for the jury and trial judge, and their findings thereon are conclusive here.

Lastly, it is contended that the court commented on the evidence in violation of the prohibition in the constitution. The appellant called a witness who testified he had known the appellant at Tacoma, in 1886 or 1887. He was then asked concerning the appellant's general reputation for honesty and integrity at that time. This was objected to as being too remote, whereupon the following colloquy occurred:

"Mr. Burch: I think under this class of cases we have a right to go back as far as we can to show good reputation and then bring it down. The Court: It may go back, yes; but that is going back pretty far. Mr. Burch: Yes sir; but a reputation is not gained in a minute. The Court: That is true, but the trouble is it may be lost in a minute, though. Well, I will overrule the objection and allow the testimony."

The remark of the court to the effect that a reputation may be lost in a minute constitutes the comment complained of. We think, however, there was no error in the remark of the court. Aside from the fact that the remark could hardly be said to be a comment on any testimony before

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the jury, it was not addressed to the jury, but to counsel, and we have held that remarks of the court as to facts in the case, addressed to counsel in reply to suggestions concerning the admission of testimony, are not comments on the facts, within the meaning of the constitution. *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

Our examination of the record convinces us that the appellant had a fair and impartial trial, and that the judgment appealed from should be affirmed. It is so ordered.

MOUNT, C. J., HADLEY, CROW, and DUNBAR, JJ., concur.

(No. 5511. Decided July 14, 1905.)

A. J. ANDERSON *et al.*, Respondents, v. EMANUEL TURATI *et al.*, Appellants.¹

TAXATION — FORECLOSURE — JURISDICTION — PROCESS — REQUISITES — NAME OF OWNER. A summons in foreclosure of a delinquency tax certificate is defective and the judgment is without jurisdiction, where the name of the owner of record was stated in the tax rolls and in the certificate, and was not given in the summons, but the name of a stranger to the title was inserted instead; and the tax deed is properly cancelled where the court finds that the true owners had no actual knowledge of the pendency of the tax foreclosure.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 17, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to set aside a tax deed. Affirmed.

J. C. Cross, for appellants.

John C. Hogan, for respondents.

HADLEY, J.—This action was brought to effect a cancellation of a tax deed which was issued by the treasurer of Chehalis county to the defendants in the cause. The plaintiffs being in possession of the land, allege that the

¹Reported in 81 Pac. 557.

existence of the deed casts a cloud upon their title, and they ask that it be removed. They tendered and brought into court the necessary amount of taxes and costs represented by the tax deed. After a trial, the court granted the relief asked, and entered judgment setting aside the tax deed and removing the cloud thereof. The defendants have appealed.

It is contended by respondents that the court was without jurisdiction to render the judgment in the tax foreclosure proceeding under which the deed issued. The foreclosure was upon a certificate of delinquency for the taxes for the years 1896 to 1900 inclusive. The property was assessed for those years in the name of Samuel Benn as owner. The certificate of delinquency so stated upon its face. The application for judgment in the foreclosure suit also expressly stated that the property was assessed to Samuel Benn. Benn conveyed the property to one Decker. The latter and his wife conveyed to the respondents Anderson, and Anderson and wife entered into an executory contract to convey to the respondents McFadden. The deed from Benn to Decker was not of record when the foreclosure suit was begun, and although in existence it had not in fact been delivered at that time. The other conveyance, and the contract above mentioned, were executed after the tax deed, and are mentioned merely to show the present interest of respondents in this suit. Benn was the holder of the legal title in fact, when the foreclosure was begun, and was also described as owner in the tax records and certificate, but appellants did not make him a party to the foreclosure suit. The summons was directed as follows:

"The State of Washington to Jacob Kraber and Mary Doe Kraber, his wife, and all persons unknown, if any, having or claiming to have an interest in and to the real property hereinafter described."

The summons not only omitted to include the name of the owner, as shown by the tax records, but the persons actually named therein were entire strangers to the title,

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having no interest in it whatever. The respondents, both by the complaint and evidence, tendered the issue that the summons was so made with the fraudulent intent of misleading the real owner; but we need not discuss that matter, inasmuch as we think the summons was insufficient without any actual fraudulent intention on the part of appellants. The statute, Laws 1901, p. 384, requires that the summons shall contain the name of the owner, if known. We said in *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, that, when the property has been assessed to an unknown owner, and when a certificate of delinquency has been so issued, the foreclosure may be had in form against an unknown owner. But we did not say that the name of an owner, as actually mentioned in the tax rolls and certificate of delinquency, may be omitted from the summons. Upon the contrary, as care was taken in that case to name in the summons the persons whose names appeared upon the tax records as owners, we stated that good faith was exercised, and that no more was required by way of investigating the subject of ownership.

We think the name of the owner described in the tax rolls and certificate of delinquency should be included in the summons, and that it is defective without it. Such omission may mislead, to the prejudice of owners and their grantees, as is claimed to have been true in this case. In the summons before us, the name of the tax record owner was omitted, and those of entire strangers to the title were inserted. It would have been difficult to prepare a summons more misleading in its terms. The court found that neither the tax record owner nor his grantees had any actual knowledge of the pendency of the foreclosure proceeding. The insertion of the name of the tax record owner would have brought at least constructive, if not actual, knowledge to him, and his grantees would have been chargeable therewith. We think, therefore, that the court was without jurisdiction to render the foreclosure judgment, that the subsequent tax

deed was issued without legal authority, and that the judgment in this action which cancelled the deed was right. The judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, ROOT, and DUNBAR, JJ., concur.

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(No. 5503. Decided July 14, 1905.)

PLUMA M. HARRIS, *Appellant*, v. ANNIE LEVY *et al.*,
Respondents.¹

TAXATION—FORECLOSURE—APPEAL—TIME FOR TAKING. LAWS 1903, § 4, providing that an appeal from a judgment in a tax lien foreclosure shall be taken within thirty days, applies to a judgment dismissing the action.

Appeal from a judgment of the superior court for King county, Bell, J., entered June 20, 1904, after vacating a default judgment, dismissing an action to foreclose a tax lien, upon denying a motion to require the defendants to answer. Appeal dismissed.

E. F. Kienstra, for appellant.

G. E. de Steiguer and *R. R. George*, for respondents.

HADLEY, J.—This action was instituted to foreclose a general tax lien. On the 7th day of October, 1903, a decree of foreclosure was entered, upon the default of the defendants. A tax deed was issued in pursuance thereof. Thereafter the defendants moved to vacate the decree and for the cancellation of the deed, for permission to pay the taxes and costs, and for restitution of the property. This motion was granted, by an order entered December 11, 1903. On the 10th day of March, 1904, the plaintiff appealed from the last named order. Said appeal was dismissed by this court on the 27th day of May, 1904. Thereafter the plain-

¹ Reported in 81 Pac. 550.

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tiff moved the superior court for an order requiring the defendants to answer the complaint in the cause. This motion was denied, by an order entered June 14, 1904, and by the same order the court dismissed the action. The order recites that the defendants had, with their motion to vacate the judgment, paid into court the full amount of plaintiff's claim, taxes, interest and costs. This appeal is prosecuted by the plaintiff from the last mentioned order.

Respondents have moved to dismiss the appeal and, among other grounds, they urge that the appeal was not taken in time. The notice of appeal was served September 9, 1904, being eighty-seven days after the entry of the order. This cause is prosecuted as a special proceeding under the statute authorizing foreclosure of tax liens. Chapter 59 of the session laws of 1903, § 4, outlines the necessary procedure for appeal in such cases. It is provided that the appeal shall be taken within thirty days after the rendition of the judgment. This court has already construed the statute to mean that said period applies not alone to the judgment of foreclosure, but to other judgments of final effect in the action. *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779; *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129. The judgment of dismissal was a final determination of the case against appellant, and her appeal should have been taken within thirty days. The appeal is therefore dismissed.

MOUNT, C. J., CROW, RUDKIN, and DUNBAR, JJ., concur.

(No. 5723. Decided July 14, 1905.)

*In the Matter of the Application of THOMAS BROWN for a
Writ of Habeas Corpus.*¹

INSANE PERSONS—ACQUITTAL OF CRIME ON GROUND OF INSANITY—IMPRISONMENT—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRESUMPTIONS. One accused of murder, who submits a plea of insanity to trial by jury and is found not guilty by reason of insanity, may be confined in the county jail until the further order of the court, conformably to Bal. Code, § 6959, and is not deprived of his liberty without due process of law where he does not allege a restoration of sanity; since he was duly accorded a fair trial, and the presumption of insanity, once found, continues; and since the law does not prevent a judicial investigation as to restored sanity.

SAME—CRUEL PUNISHMENT. The state has power to protect its people from dangerous insane persons by providing, after a full hearing, for their confinement in a prison while the condition continues, and such confinement does not violate the constitutional inhibition of cruel punishment.

SAME—JUDGMENT—CERTAINTY. An order for the confinement of a dangerous insane person until the further order of the court is not void for uncertainty, the order being subject to modification upon application.

Application filed in the supreme court June 13, 1905, for a writ of habeas corpus, on behalf of a petitioner confined under an order of the superior court for Lewis county, Rice, J., entered May 9, 1905. Writ denied.

Maurice A. Langhorne and *C. H. Forney*, for petitioner. Bal. Code, § 6959, is in conflict with the fourteenth amendment of the federal constitution. *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 524; *Doyle, Petitioner*, 16 R. I. 537, 18 Atl. 159, 27 Am. St. 759; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *Cooley, Torts* (2d ed.), p. 206, note 1. Due process of law applied to judicial proceedings, requires due regard to established rules and fundamental principles of law, and

¹Reported in 81 Pac. 552.

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Citations of Counsel.

proceedings regular and appropriate to the questions involved. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72; *Ex Parte Macdonald*, 76 Ala. 603; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; 10 Am. & Eng. Ency. Law (2 ed.), 296, 301; *Trustees of Griswold College v. Davenport*, 65 Iowa 633, 22 N. W. 904; *In re Ah Lee*, 5 Fed. 899. In a criminal case, the offense must be described in an accusation, the accused must have his day in court and a trial with pleadings, practice, and evidence according to established procedure, before a competent court, and authority for every step must be found in the law of the land. 10 Am. & Eng. Ency. Law (2d ed.), 303, 304; *Hood v. State*, 44 Ala. 81; *Tiedeman, State & Fed. Control*, pp. 128, 131. These principles likewise apply to insanity proceedings. 16 Am. & Eng. Ency. Law (2d ed.), 599, 600; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Eddy v. People ex rel. Eddy*, 15 Ill. 386; *Hathaway v. Clark*, 5 Pick. 490; *Conkey v. Kingman*, 24 Pick. 115; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *State v. Ryan*, 70 Wis. 676, 36 N. W. 823; *In re Janes*, 30 How. Pr. 446; *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Colby v. Jackson*, 12 N. H. 526. Confinement without investigation assumes the insanity, the very question at issue. *Van Dusen v. Newcomer*, 40 Mich. 90. The fact of insanity must be found by a jury of inquiry. *In re Bryant*, 3 Mackey (D. C.) 489; *Commonwealth ex rel. Stewart v. Kirkbride*, 2 Brewst. (Pa.) 419; *Territory v. Sheriff*, 6 Mont. 297, 12 Pac. 662; *State ex rel. Kiel v. Baird*, 47 Mo. 301; *Fiscus v. Turner*, 125 Ind. 46, 24 N. E. 662; *De Hart v. Condit*, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. 545. A judgment of confinement "until the further order of court" is void. 15 Am. & Eng. Ency. Law (2d ed.), 180;

1 Bishop, New Crim. Proc., § 1297; 21 Am. & Eng. Ency. Law (1st ed.), 1073; *Davis v. Catron*, 22 Wash. 183, 60 Pac. 131. The judge was without power to decide that the insanity existing at the time of the crime continued and was such at the time of the trial as to warrant imprisonment. *Kelleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; Bal. Code, §§ 2660-2680.

J. R. Buxton and *A. J. Falknor* for respondent. Insanity once shown to exist is presumed to continue, and the burden of proving restoration to sanity is upon him who asserts it. 16 Am. & Eng. Ency. Law (2d ed.), 605; Schouler, Wills, p. 384, § 189; Cooley, Torts (2d ed.), p. 178. This rule applies in the case of acquittal of crime on the ground of insanity. *United States v. Lawrence*, Fed. Cas. No. 15,577; Carr, Trial of Lunatics, pp. 75, 77; 1 Tiedeman, State & Fed. Control, p. 136; *Commonwealth v. Meriam*, 7 Mass. 168; *State v. Klinger*, 46 Mo. 224; *Clearfield County v. Cameron Township Poor Dist.*, 135 Pa. St. 86, 19 Atl. 952.

HADLEY, J.—The petitioner made original application in this court for a writ of habeas corpus, directed to the sheriff of Lewis county. He asserts that he is unlawfully detained and imprisoned. His petition shows that he was regularly tried in the superior court of said county on the charge of murder in the first degree, to which charge he had interposed the plea of not guilty. The verdict returned was as follows:

"We, the jury, find the defendant not guilty by reason of insanity."

Immediately after the return of the verdict, on the 1st day of May, 1905, the trial court ordered the sheriff to return the petitioner to the county jail, to await the further order of the court. He was accordingly detained in jail until the 8th day of said month, when the trial judge ordered

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him to be brought into court. The petition alleges that the court thereupon, without any hearing or trial, and without giving the petitioner any opportunity to be heard in his own behalf, arbitrarily and of its own motion announced that, because of the verdict of the jury, which established that the petitioner was not guilty by reason of insanity, the court considered that his discharge and going at large would be manifestly dangerous to the peace and safety of the community. It is further shown that, for the above reasons, an order was entered to the effect that the petitioner shall be, by the sheriff, confined in the county jail, until the further order of the court.

The sheriff made return to the petition by way of answer. The answer avers that the petitioner was charged with murder in the first degree, for the killing of his father; that he pleaded and urged, as a defense to said charge, insanity caused by epilepsy, cruel treatment by his father, and the degeneracy of the latter prior to the birth of the petitioner; that he offered proof during the trial of continuous and permanent insanity from said causes, and that his demeanor during the trial appeared to be consistent with his claim of general insanity. The above alleged facts are not controverted by the petitioner.

The court acted on the authority of a statute of this state which is set forth in Bal. Code, § 6959. It is as follows:

"When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged."

The petitioner contends that the statute violates the following portion of the fourteenth amendment to the constitution of the United States:

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is further insisted that the statute violates the following provisions of §§ 3, 14, 21, and 22, of art. 1 of our state constitution:

"§ 3. No person shall be deprived of life, liberty, or property without due process of law.

"§ 14. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

"§ 21. The right of trial by jury shall remain inviolate, . . .

"§ 22. In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; . . ."

Has the petitioner been deprived of due process of law in the premises? He was tried before a jury to whom he himself submitted the issue that he was insane when the crime was committed. He was permitted to fully introduce his evidence upon that subject, and the jury were instructed as to their duty in the premises. The verdict returned was in his favor upon the issue which he tendered, and he was therefore accorded due process of law and the right of trial by jury upon that subject. The jury found that he was insane, and it was the manifest duty of the court to enter some kind of a judgment upon the finding of the jury. The petitioner erroneously assumes that it was a judgment en-

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tered in a new and original proceeding, without due process of law and without opportunity for a hearing. It was, however, a judgment rendered upon the verdict of a jury, which had been regularly returned in a proceeding wherein all constitutional rights had been accorded. Should it have been a judgment of discharge, according to petitioner his liberty? He does not allege that he is now sane. The solemn verdict of a jury, after due trial, establishes that he was insane when the killing occurred. The record before us shows that the character of insanity considered was not of a temporary sort, but was rather progressive and permanent in its nature, by reason of epilepsy and congenital conditions.

"The presumption being that general insanity once shown to exist still continues, unless of a temporary sort, like the delirium of drunkenness or a fever, the burden of proof to establish a lucid interval or mental restoration rests upon the party who asserts it." Schouler, Wills (3d ed.), § 189, and cases cited.

In the chapter on the subject of Insanity, in 16 Am. & Eng. Ency. Law (2d ed.), under the discussion of the continuance of insanity of a permanent nature, at page 604 of said volume, the following statement of the rule as to presumption is made:

"When habitual insanity in the mind of the person whose act is in question is once established, then the party who would take advantage of the fact of restoration to a sane condition or of an interval of reason must prove it, for insanity of that character is presumed to continue until the contrary is shown."

Decisions from twenty-six of the American states are cited in support of the above text, as well as a long list of English decisions. With such an array of citation, it would seem that the rule is well established, and that a review of the decisions is unnecessary. We have examined a number of the authorities cited, and find that they fully sustain

the rule announced by the textwriter, that, when insanity of a permanent character is once established, it is presumed to continue, and the presumption prevails until the contrary is shown, the burden of showing which is upon him who asserts sanity. Therefore, inasmuch as it was a fact established after a full hearing that the petitioner was insane at the time of the homicide, the presumption is that the same condition continues, and the burden is upon him to show to the contrary. The record does not show that he has ever offered to make such showing to the court below, but rather that he demands his release as an absolute right.

We have thus seen that, as to the issue of insanity, the petitioner was accorded the constitutional rights of due process of law, trial by jury, and the privilege of appearing and presenting his case in person and by counsel. The additional constitutional objection urged is that no cruel punishment shall be inflicted. The statute authorizes the court, among other things, to commit one acquitted by reason of insanity to prison. No particular prison is specified, and it may be reasonably inferred that any prison coming within the committing jurisdiction of the court trying the cause may be selected, such as the county jail of the proper county, or the state penitentiary. In this instance the commitment was to the county jail.

May the state, in the exercise of its sovereignty and in its endeavor to protect its people from dangerous insane characters, provide for their confinement in a prison? It is the policy of the state to confine such persons, but it is ordinarily done in an asylum, and not in a prison, so-called. We know of no reason, however, why the state may not classify insane persons and require that those whose dangerous tendencies have been manifested by the perpetration of acts imperiling the safety of the community shall, after a full hearing establishing the fact of insanity, be confined in prison while that condition continues. While confinement of any character may, in a sense, contain elements of cruelty,

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yet the safety of the people requires that such persons shall be confined.

It is urged that the order of the court is void for uncertainty, in that it is indefinite as to time. The imprisonment is to continue until the further order of the court. The order conforms to the statute in that particular. No time is specified in the statute for the duration of the imprisonment. In the nature of the subject treated by the statute, it must be so. It was the undoubted intention of the legislature that imprisonment shall not be continued after restoration to sanity, and that the court shall so retain control of its order in the premises that it may afterwards modify it to suit changed conditions of mind or body, as they may be made to appear. Such an order is analogous to one disposing of the custody of the children in a divorce proceeding, which is made to continue until further order of the court, and subject to modification with changed conditions. Although the fact of insanity has been regularly established, and that condition is presumed to continue until the contrary is shown, yet the petitioner has the undoubted right at any time to assert that he is restored to sanity, and to demand that the court shall duly investigate that subject. The statute in no way attempts to prevent such a demand upon his part, and cannot be held to be invalid on the ground that it prevents him from exercising such privilege.

The petitioner cites *Underwood v. People*, 32 Mich. 1, in support of his contention against this legislation; but an examination of that case discloses that the Michigan statute provided that one acquitted on the ground of insanity should remain confined in an asylum until an investigation as to his restoration should be set in motion by the prison inspectors. The court said: "It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors." Under that statute the prisoner could take no step on his own initiative, but was left entirely to the will of others. Such a provision manifestly

violated a personal right. But our statute makes no such attempt to prevent the exercise of a fundamental privilege. The petitioner quotes extensively in his brief from a note in Cooley, Torts (2d ed.), pp. 206, 207. The quotation does not, however, conflict with our argument above that, with the presumption of insanity continuing, confinement is enforceable when the law does not attempt to prevent a judicial investigation as to restored sanity, and which may be initiated at the pleasure of the one confined.

We find no constitutional objections to the statute, and the order of the court is in strict conformity with its provisions. For the foregoing reasons, we think the petitioner has not shown sufficient grounds for his discharge, and the writ is denied.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, ROOT, and DUNBAR, JJ., concur.

(No. 5213. Decided July 14, 1905.)

E. H. AHRENS *et al.*, Appellants, v. THE CITY OF SEATTLE,
*Respondent.*¹

APPEAL—BOND—CONDITIONS. A bond on appeal conditioned for the payment of all costs and damages adjudged on the appeal and for the performance of any judgment, covers costs on the dismissal of the appeal, and is sufficient although not in the exact language of the statute.

SAME — BOND AS SUPERSEDEAS — AMOUNT — APPEAL FROM ASSESSMENT. Upon an appeal from a judgment confirming a municipal assessment and for \$18.90 costs, in which the court fixed no amount for a supersedeas bond, a bond on appeal in the sum of \$300, sufficient in form as an appeal bond, will give the supreme court jurisdiction of the appeal, where it is not conditioned to effect a stay, although it contains some of the recitals of an ordinary supersedeas bond, since it is a mere nullity in respect to the stay.

¹Reported in 81 Pac. 558.

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MUNICIPAL CORPORATIONS.—ASSESSMENTS.—APPEAL FROM CONFIRMATION—TRIAL IN SUPERIOR COURT—NEW EVIDENCE. Upon appeal from a municipal assessment the appellant is entitled to a trial on new evidence submitted by him, and is not confined to the record certified from the city council.

APPEAL — DECISION — REVIEW OF SPECIAL ASSESSMENT — REMAND. Upon reversing an order of the superior court, confirming a municipal assessment, for error in excluding all evidence offered, the supreme court is not confined to a correction of the assessment roll, but will remand the case to the superior court for a full trial on the evidence.

Appeal from the judgment of the superior court for King county, Bell, J., entered March 3, 1904, in favor of the city, upon excluding all evidence offered, dismissing an appeal from a municipal assessment. Reversed.

Shepard & Lyter, for appellants.

Mitchell Gilliam, Hugh A. Tait, and Wm. Farmerlee (*James B. Howe*, of counsel), for respondent.

HADLEY, J.—At the time of the first oral argument on this appeal, respondent suggested that the appeal bond is defective, and orally moved to dismiss the appeal. Argument was heard upon the subject, and the matter was taken under advisement. At the recent term of this court, another oral argument was heard, and the cause was submitted to the entire court as now constituted. The alleged defect in the appeal bond was not discussed at the time of the last oral argument. We do not understand, however, that respondent has abandoned its position in that matter, but rather that further discussion of it was omitted for the reason that the court may have indicated that it did not care to hear further argument on that subject. The defects suggested are, (1) that the bond does not contain the words "or on the dismissal thereof;" (2) that it is insufficient in amount to operate both as a supersedeas and a cost bond.

With regard to the first point suggested, it does appear that the words above quoted from the statute are not in-

cluded in the bond. It is, however, conditioned that appellants will not only pay all costs and damages adjudged against them on the appeal, but that they will also perform any judgment or order that may be rendered against them by this court. A judgment for costs on the dismissal of the appeal would therefore be covered by the terms of the bond. It is sufficient to protect every right of respondent, and in such case the bond should not be held to be jurisdictionally defective for mere failure to use the exact words of the statute. *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426.

Referring now to the second point urged under the motion, the record discloses that the appeal is not from a judgment for the recovery of money, but is from a judgment confirming a special assessment for local improvements, on appeal to the superior court from the city council of the city of Seattle. It is therefore manifest that the judgment could not be stayed without an order of the court fixing an amount for a supersedeas bond. The record neither discloses that the court ever fixed any amount, nor that appellant ever asked for such an order. The amount of the obligation stated in the bond as given is \$300. While it contains some of the recitals of an ordinary supersedeas bond, yet inasmuch as the necessary preliminary step to effect a stay of such a judgment was not taken, it could in no event have become a stay bond, regardless of the amount stated in it. Under such circumstances the bond is a mere nullity in respect to the stay, and from its own recitals we think it is also clear that it was not intended as a supersedeas bond. It limits liability to "all costs, etc., not exceeding in amount or value the above named original judgment besides costs on appeal." Liability is therefore limited merely to the judgment of \$18.90 costs, the amount adjudged below, and to the costs on appeal. Thus it clearly appears that there was no intention to stay proceedings under the judgment confirming the assessment roll. The bond is sufficient in form and amount as an ordinary appeal bond, and any sur-

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plus recitals ordinarily used in a stay bond are merely immaterial. *King v. Branscheid*, 32 Wash. 634, 73 Pac. 668. The motion to dismiss the appeal is denied.

Appellants are the owners of certain real estate in the city of Seattle, and the city sought to assess said property for the purpose of paying the costs and expenses of regrading Pike and East Pike streets. They filed with the city council written objections to the assessment roll. The objections were overruled, and the objectors appealed to the superior court. When the matter came on for hearing in that court it was urged by the city that, in the consideration of the appeal, the superior court was restricted to matters appearing upon the face of the transcript certified by the city clerk. This view was adopted by the trial court, and all evidence offered in support of the objections to the assessment was rejected. Judgment was entered confirming the assessment roll, and from that judgment this appeal is prosecuted.

It is contended by appellants that the court erred in refusing to hear testimony on the appeal. This subject involves an examination of chapter 118 of the session laws of 1901 [Laws 1901, p. 240], which is an act authorizing the levy and collection of special assessments for local improvements in cities of the first class. Section 2 of the act provides for filing with the city council written objections to the assessment roll, and also that the decision of the council or other legislative body may be reviewed by the superior court on appeal thereto. It is provided that the court shall hear and determine the appeal without a jury, and shall confirm, correct, modify, or annul the assessment, in so far as the same affects the property of the appellant. The superior court appears to have construed the statute as conferring upon that court only the ordinary review powers of an appellate court, with no power to hear and consider evidence that was not heard by the subordinate tribunal and duly certified by it.

We do not believe that such was the intention of the legislature. If such were the case, a protestant would be compelled to fully and at length introduce his evidence before the city council, preserve the same, and take it to the superior court, or he could not secure a review upon the facts. The statute provides no method whereby a protestant can compel the attendance of an unwilling witness before the city council, and no other method is provided for obtaining his testimony. There is neither provision for administering oaths to witnesses who may appear before the council, nor for certification to the superior court of any testimony taken. The statute specifies a copy of the notice of appeal, a transcript of the assessment roll, a copy of the objections filed with the city clerk, and of the order of the council confirming the assessment roll, as necessary to be certified on appeal, and then adds: "and the record of the council or other legislative body with reference to said assessment." The term "record," as used, cannot reasonably be said to include the testimony, but rather refers to such record as the minutes of the proceedings of the council upon the subject. Doubtless the purpose of the written objections is to bring to the attention of the council the fact that the correctness of the assessment is challenged, and the reasons therefor. An opportunity is thus given for further and more complete investigation by the council, if it shall be disposed to enter upon it. But the statute evidently did not contemplate that a protestant can demand the hearing of testimony as a matter of right, together with a full and exhaustive investigation of a judicial nature before a nonjudicial body. That right should, however, be accorded him somewhere, and we think the statute contemplates that he shall have it in the superior court, a tribunal possessing all the necessary attributes and powers for judicial determination. When, therefore, an objector has properly, in writing, called the attention of the city council to his reasons for protesting

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against the assessment, and has duly appealed, he is entitled to submit, and have considered on the appeal, all competent evidence he may offer in support of his objections.

Certainly, much of the evidence offered, as disclosed by the statement of facts, was material and vital in support of the issues raised by the objections. The court did not undertake to pass upon its materiality or competency, but rejected all evidence for the reasons aforesaid. There are, therefore, no assigned errors before us for review as to the rejection of evidence for want of competency. The error of the court consisted in trying the case as a whole upon a wrong theory, and in view thereof it remains for us to consider what shall now be done with the case on this appeal.

The statute authorizing the appeal to this court states as follows: "And the supreme court on such appeal may correct, change, modify, confirm, or annul the assessment in so far as the same affects the property of the appellant." It does not follow, however, that no other power resides in this tribunal in such a case as is now before us. The statute has in view a case which is fully here on appeal, so that intelligent action may be taken. This case is not so here, but it is not because of any fault of appellants, and they should not be left without opportunity to submit their evidence and be heard thereon. The statute undoubtedly intends that this court shall review and determine the facts as well as the law questions involved and, in aid of our jurisdiction to do so, we doubtless might remand the case for the taking of testimony to be returned here for our examination. But we believe the whole case should be heard and determined by the superior court. The determination of that court may put an end to the contest. We therefore think the case should be remanded to the superior court, with instructions to vacate the judgment appealed from, and then proceed to a full trial and judgment upon all questions of law and fact involved, permitting the formal introduction of testimony, and hearing and determining the

case as is done in equity causes. It is so ordered, and appellants shall recover their costs on this appeal.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, ROOT, and DUNBAR, JJ., concur.

(No. 5583. Decided July 14, 1905.)

G. W. FISCHER *et al.*, Respondents, v. GEORGE B. KITTINGER, Appellant.¹

JUDGMENTS—REVIVAL—CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—STATUTES—VALIDITY OF PART. LAWS 1897, p. 52, repealing the statute authorizing the revival of judgments, being a uniform piece of legislation taking away all right of action upon all judgments, and void as impairing the obligation of the contract as respects prior judgments, is void as to section 4, repealing the remedy of revival by notice and motion.

Appeal from an order of the superior court for King county, Griffin, J., entered November 17, 1904, reviving a judgment, upon motion of the judgment creditor. Affirmed.

Hughes, McMicken, Dovell & Ramsey, and *James Kiefer*, for appellant, contended, among other things, that as long as there remained the remedy by action upon the judgment, it was competent for the legislature to repeal the remedy of revival by motion. *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Sneed v. Tennessee*, 96 U. S. 69, 24 L. Ed. 610; *Thayer v. Seavey*, 11 Me. 284; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Evans v. Montgomery*, 4 W. & S. (Pa.) 218; *Von Baumbach v. Bade*, 9 Wis. 510; *Morley v. Lake Shore etc. R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454; *Penniman's Case*, 103 U. S. 714, 26 L. Ed. 602; *Mason v. Haile*, 12 Wheat. 370, 6 L. Ed. 660; *Beers v. Haughton*, 9 Pet. 329, 9 L. Ed. 145; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701;

¹Reported in 81 Pac. 551.

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Donnelly v. Corbett, 7 N. Y. 500; *Rosenplaenter v. Provident Sav. Life Assur. Soc.*, 91 Fed. 729; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Conkey v. Hart*, 14 N. Y. 22; *Watts v. Everett*, 47 Iowa 269; *Toffey v. Atcheson*, 42 N. J. Eq. 182, 6 Atl. 885; *Rader v. Southeasterly Road District*, 36 N. J. L. 273; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793.

Ira Bronson and D. B. Trefethen, for respondents.

FULLERTON, J.—On March 12, 1892, George W. Fischer and James Reid Macdonald, then copartners as Fischer & Macdonald, recovered a judgment in the superior court of King county, against the appellant, for the sum of \$2,331.31 and costs of action. Subsequently the judgment was, for a valuable consideration, assigned to the respondents. In the early part of the year 1898, the respondents brought a common law action against the appellant upon the judgment, and on May 18, of that year, recovered against him for \$3,908.31, being the amount of the earlier judgment, with interest and costs of action added. On May 18, 1904, the respondents commenced proceedings to revive the last mentioned judgment, under the statute found in 2 Hill's Code, §§ 462, 463, which provides for the revival of judgments by notice and motion. To the motion filed by the respondents, the appellant demurred, on the ground that the statute under which they were proceeding had been repealed by the act of March 6, 1897, relating to the duration of judgments. Laws 1897, p. 52. The demurrer was overruled, and an order made on November 17, 1904, reviving the judgment in favor of the respondents, for the amount of the principal and interest then due thereon. This appeal is from the order reviving the judgment.

The question whether the act of March 6, 1897, repealed the statute providing for the revival of judgments by notice and motion was first before this court in *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216. It was there held that, because

the act was one uniform piece of legislation on one subject, it was void or valid as a whole, and being void as to judgments rendered on contracts existing at the time of its enactment, the remedy of revival by notice and motion as to such judgments was not repealed by it. This construction of the statute was followed in the subsequent cases of *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104, and *Denio v. Benham*, 24 Wash. 485, 64 Pac. 749. In the last case cited, the principal reliance of the appellant was on the question of the repeal of this statute, and his learned counsel made able and elaborate arguments thereon. The court, however, felt that the question had been settled by the cases that had preceded it, and declined to reopen it or discuss it further.

It will be observed that the judgment sought to be renewed in this proceeding was rendered after the passage of the act of March 7, 1897, while the judgments under discussion in the cases above cited were rendered prior to the passage of that act. It was suggested at the hearing that this fact made a difference in the application of the rule, but we think there is no substantial ground for the contention. The statute of March 7 was held inoperative as to the judgments in question in the cases announcing the rule, because to give it effect would impair the obligation of a contract, in violation of § 10, art. 1, of the federal constitution. As the judgment here in question was rendered upon a contract entered into prior to the passage of the act of March 7, it is plain that to hold the act operative as to it would have a like effect—it would impair the obligation of such contract. The statute, therefore, is inoperative as to this judgment. *Howard v. Ross*, 38 Wash. 627, 80 Pac. 819. And, it being true that the act has no partial operative effect, it is as much invalid as a whole to this judgment as it is to contract judgments rendered prior to its passage.

The order appealed from is affirmed.

MOUNT, C. J., CROW, HADLEY, RUDKIN, and DUNBAR, JJ., concur.

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(No. 5673. Decided July 14, 1905.)

THE STATE OF WASHINGTON, *on the Relation of C. M.
Nettleton, as Administrator etc., et al., Respondent,*
v. OTTO A. CASE, *as County Clerk of
King County, etc., Appellant.*¹

EXECUTORS AND ADMINISTRATORS—FEES—TAXATION—UNIFORMITY—
CLERK'S FEES BASED UPON VALUATION OF ESTATE—PROPERTY TAX—
VALIDITY. Laws 1903, p. 290, prescribing a scale of fees, based upon
the valuation of the estate, to be paid to the clerk of the court
upon filing the first papers in probate, imposes a charge in the nature
of a property tax upon estates, which is void because not uniform
or levied in proportion to value, where the fees exacted are paid into
the general fund of the county and have no relation to the services
rendered in the administration of the estate.

SAME—STATUTES—TITLE OF ACT—SUFFICIENCY. Laws 1903, p. 290,
entitled an act relating to the fees of county officers, and which pro-
vides for an *ad valorem* charge upon estates in probate, called a
clerk's fee, in the nature of a property tax, violates art. 2, § 19 of
the constitution providing that no bill shall embrace more than one
subject, which shall be expressed in the title.

Appeal from a judgment of the superior court for King
county, Frater, J., entered April 13, 1905, in favor of the
relators, granting a writ of mandate as prayed for, upon over-
ruling a demurrer to the petition. Affirmed.

Kenneth Mackintosh and *Ernest B. Herald*, for appellant.
Allen, Allen & Stratton, for respondent.

HADLEY, J.—The relators applied to the superior court
for a writ of mandate, directed to the county clerk of King
county, requiring him to receive and file certain papers in
probate proceedings. An alternative writ was issued. By
the demurrer to the petition and alternative writ, the fol-
lowing facts are admitted: D. McL. Brown died in King

¹Reported in 81 Pac. 554.

county, on the 23d day of January, 1905, he being at the time of his death a member of the partnership consisting of himself, W. A. Brown, D. A. Brown, and C. M. Nettleton, doing business under the firm name of Seattle Bridge Company. Thereafter the said Nettleton was duly appointed as administrator of said partnership estate, and he qualified as such. An inventory and appraisement of the estate were duly prepared, the appraisement showing the valuation of the property belonging to the partnership at \$127,655.50.

The administrator presented the inventory and appraisement to the clerk for filing, whereupon the latter demanded that the administrator should pay the sum of \$225 as probate fees, and refused to file the papers until said sum should be paid to him. Thereafter the administrator also prepared a petition for an order to sell certain real estate belonging to the partnership, and thereupon tendered the petition to the clerk for filing, together with filing fees; but the clerk refused to file the same, or to accept the sum tendered otherwise than on account of part payment of said demand of \$225. The demurrer challenged the sufficiency of the above recited facts to authorize the issuance of the writ of mandate, and the same was overruled. The clerk declined to further answer, and it was thereupon ordered that a peremptory writ of mandate should issue, commanding him to immediately file the papers mentioned. From said order he has appealed.

The appeal involves the constitutionality of an act of the legislature of 1903, relating to the fees of state and county officers, witnesses, and jurors. See, Laws 1903, p. 290. That portion of the act particularly involved here relates to the charges in probate proceedings, and will be found at pages 293, 294, of said session laws. The trial court held the said provisions to be unconstitutional.

It will be observed that the statute requires the payment of \$5, in probate proceedings, at the time the first paper therein shall be filed. In addition to the above amount, a

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graduated schedule of fees is provided. Increased amounts are chargeable to estates of \$1,000 or more. The sum to be paid increases according to the value of the estate involved, the amount to be determined by the appraisement returned into court. When the amount of the estate is \$1,000 or more, and less than \$2,000, the additional sum required is \$2.50. The amount is thereafter increased, based upon stated estate values, until the valuation reaches \$50,000 or more, and less than \$100,000, in which case the sum of \$125 shall be paid. It is then provided that estates exceeding \$100,000 shall pay, in addition to the said \$125, the sum of \$50 for each additional \$20,000 valuation above \$100,000. The estate at bar, as we have seen, is valued somewhat in excess of \$127,000, and the fee demanded by the clerk was \$225. Whether the amount demanded is excessive, even under the terms of the statute, we shall neither discuss nor decide, since that matter is not discussed by counsel. The constitutionality of the statute is alone considered in the briefs.

The increased fees provided by the statute are based upon an *ad valorem* theory, and regulated according to the amount of property owned by an estate. It was the view of the trial court that charges so exacted amount to a property tax, and that the statute therefore violates our state constitutional provisions with respect to the uniformity of property taxation. Section 1 of art. 7 of the constitution provides that:

"All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. . . ."

Section 2 of the same article also requires that:

"The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corpora-

tion shall pay a tax in proportion to the value of his, her, or its property. . . ."

Section 9 of the same article also contains the following:

"For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

It does not appear that the property of the estate at bar is exempt from taxation, under the first constitutional provision above quoted, but it is subject to the burden thereof, and must be taxed uniformly with other property according to its value. If, therefore, the charges imposed by the statute in question are in the nature of a tax upon the property, they would seem to impose a burden thereon in addition to that borne by property in general.

Appellant argues that, even in cases of taxation, the rule of equality and uniformity does not forbid a liberal classification, and that, since this law classifies estates according to their value, all in each particular class are affected alike. He cites *State v. Clark*, 30 Wash. 439, 71 Pac. 20, and *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893. Neither of said cases relates to property taxation. The first discusses the inheritance tax law, and expressly holds that such a tax is not a property tax, but is a mere charge for the privilege of succession to the ownership and enjoyment of property, following *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, which expressly distinguished such a charge from property taxes, which must be uniform and equal under the state constitutions.

The second case cited discusses a license or occupation tax statute. Such statutes do not provide for property taxes, but are usually based upon the necessity for police regulation. It is true such statutes usually contain revenue features, and some may be entirely for revenue purposes and not for regulation; yet their exaction of revenue is not a

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property tax, but is in the nature of an occupation tax for the privilege of conducting a particular business.

No authority has been called to our attention which holds that property itself may be so classified that it shall bear a burden greater than that of other property of like value within the same assessment jurisdiction. If, then, the exactions from estates required by this statute amount to property taxes, we think the statute cannot be upheld.

It is provided that the money thus collected shall be paid into the county treasury, and it thus becomes a part of the public funds, like that derived from ordinary taxation. Appellant further argues, that the same is true of the ordinary fees collected by the clerk for services rendered; that the charge in question here may be regarded not as a tax upon property, but as a fee for services rendered; and that the legislature has the right to fix the amount of such fee. It is true the statute calls the charge a "fee," but if it is apparent upon the face of the statute that the charge is in fact not based upon actual and necessary services rendered or to be rendered, but is based entirely upon a property valuation, thereby partaking of the nature of a tax, it would seem to be wholly immaterial by what name the statute may designate it. The statute in terms shows that the charge is based upon the value of the estate, and shall we conclude that the legislature intended to say, in effect, that the amount of actual and required services varies according to the value of the estate only? If the legislature intended to so declare, it cannot be said that the declaration is supported by experience. Can the legislature arbitrarily say that greater service is required in the settlement of an estate valued at \$1,000 than one valued at \$999.99? We think not, and yet such is the exact effect of this statute, if it shall be held that these charges are fees for services only.

It seems apparent to us that the legislature cannot arbitrarily adopt such a standard for measurement of the value of the services of the clerk in probate proceedings. It is

true, our statutes fix the compensation of an administrator according to the value of the estate which comes into his hands, but such a measurement of value, we apprehend, is chiefly founded upon the degree of responsibility assumed, an element of proper consideration in fixing the value of an administrator's services. No such element exists in the case of the clerk. His services in the premises are purely clerical, and the amount thereof depends upon the filings and records of each particular case, which can in no reasonable sense be said to depend in each given case upon the value of the estate. It seems clear, therefore, that this statute exacts payments regulated by property valuations alone, and that it must therefore be a tax upon property. Taxes are defined to be "burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury.'" 27 Am. & Eng. Ency Law (2d ed.), 578. The charges here discussed, and which are imposed by the statute in question, seem to include every element comprehended in the above definition.

Appellant has not called our attention to any decided cases bearing directly upon legislation of a character similar to that here under examination. Relators, upon the other hand, cite decisions from two jurisdictions which are adverse to such statutes. A statute essentially similar to ours was passed in Minnesota. By the terms of that statute, a charge of \$10 was exacted when the inventory valuation of the estate exceeded \$2,000 and did not exceed \$5,000. A charge of \$25 was required when the valuation exceeded \$5,000 and did not exceed \$10,000, and by similar increases the charges were greater for greater valuations. The supreme court of Minnesota held that the statute was unconstitutional in *State ex rel. Davidson v. Gorman*, 40 Minn. 232, 41 N. W. 948. The court reasoned as follows:

"But the sums required by this act to be paid into the county treasury must be regarded as *taxes*, in the ordinary

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sense of that word, and as it is used in the constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. There is no necessary, natural, or even probable correspondence between the sums to be paid (widely different in amounts with respect to estates of different values) and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court. It cannot be assumed, upon any ground of probability, that these proceedings or services will be different or greater in the case of an estate of the value of more than \$500,000 than in one of the value of from \$35,000 to \$50,000,—yet in the former case \$5,000 must be paid, in the latter \$100. . . . The purpose for which such payments are required is strictly public in its nature, being directly ‘for the use and benefit of the county,’ as the law declares, and indirectly for the support of a court established by the constitution, with exclusive original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court, is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes.”

In 1895 the legislature of California enacted a similar statute. It was provided that a fee of \$5 should first be paid by all estates, and an additional fee of \$1 for each additional \$1,000 in excess of \$3,000 of valuation. In *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012, the statute was held unconstitutional. The court said:

“It is perfectly plain that the legislature has attempted by that portion of section one, above quoted, to levy a prop-

erty tax upon all estates of decedents, infants, and incompetents. The *ad valorem* charge for filing the inventory is in no sense a fee, or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and, as to the estates of decedents, it applies not to the distributable residue after payment of debts and expenses of administration, but to the whole body of the estate, and would be collectible, if the law were valid, from an insolvent estate, as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is in this particular invalid for several reasons; 1. It violates section 1 of article XIII of the constitution, in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable. 2. The subject of the act is not expressed in its title, and is in no wise germane thereto—a violation of section 24 of article IV of the constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title.”

It will be observed, from the closing words of the last above quotation, that the California statute was also held invalid for the further reason that the subject was not mentioned in its title. The title was essentially similar to that of our own statute, and was as follows:

“An act to establish the fees of county, township, and other officers, and of jurors and witnesses in this state.”

The title of our statute is as follows:

“An act in relation to the fees of state and county officers, witnesses and jurors, and repealing an act entitled ‘An act in relation to the fees of state and county officers, witnesses and jurors and amending Section 2086 of the Code of Washington of 1881,’ the same being approved March 15, 1893.”

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Statement of Case.

By no reasonable exercise of the imagination can it be inferred from the above title that the act treats of the subject of exacting an *ad valorem* charge or tax from the property of estates. It therefore violates § 19 of art. 2 of our state constitution, which requires that, "No bill shall embrace more than one subject, and that shall be expressed in the title."

For the reasons hereinbefore assigned, and also upon authority of decisions cited, we believe the act in question is unconstitutional, in the particular here involved, and that the conclusion of the lower court was right. The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

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141	699

(No. 5622. Decided July 18, 1905.

W. H. HARRIS *et al.*, *Appellants*, v. THE CITY OF TACOMA,
Respondent.¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—APPEAL TO SUPREME COURT—NOTICE—SUFFICIENCY. A notice of appeal from a municipal assessment need not recite the names of all the appellants, but a substantial compliance with the statute is sufficient.

SAME—FILING OF TRANSCRIPT AND BOND. Upon an appeal from a municipal assessment it is not essential that the transcript and bond be filed at the same time, and the filing of the bond two days before the transcript is not ground for dismissal.

SAME—PARTIES—JOINDER OF OBJECTORS. All parties interested in objections to a municipal assessment may join in the appeal to the superior court.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered January 31, 1905, upon motion of the city, dismissing an appeal from a municipal assessment, for irregularities in perfecting the appeal. Reversed.

¹Reported in 81 Pac. 691.

Emmett N. Parker and W. H. Harris, for appellants.

O. G. Ellis, J. J. Anderson, and R. E. Evans, for respondent.

FULLERTON, J.—The city of Tacoma improved certain of its streets, and sought to tax the costs thereof to the property benefited. Among the properties assessed for that purpose, were certain lots belonging to the appellants above named. The appellants filed written objections to the assessment roll, as returned to the city council, questioning the regularity and correctness of the assessment proceedings, in so far as it affected their property. The city council, after a hearing had thereon, overruled the objections, and passed an ordinance confirming the assessment. The appellants sought to appeal from the action of the city council, and to that end filed a written notice of appeal with the city clerk, within ten days from the passage of the ordinance confirming the assessment. Eight days later the attorney representing the appellants and the attorney for the city of Tacoma entered into a written stipulation, extending the time for filing the transcript from the city clerk's office with the clerk of the superior court from January 16, 1905, the date it would expire by the limitation in the statute, until January 23, 1905. On the same day the appellants executed their bond on appeal, and filed such bond with the stipulation in the office of the clerk of the superior court. Two days later, but within the statutory time, the transcript was filed. Three days thereafter the appellants served, on the head of the legal department of the city of Tacoma, and the city clerk, written notice of the filing of the transcript, fixing therein a time when the matter would be called up for hearing before the superior court. On the day appointed for the hearing, the city of Tacoma, by its counsel, moved to dismiss the appeal for irregularities in the proceedings relating to the appeal, and for want of jurisdiction in the superior court. This motion was granted, and an order

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entered dismissing the appeal. This appeal is taken from the order of dismissal.

The statute relating to appeals from orders confirming assessments for a local improvement provides, among other things, as follows:

"Such appeal shall be made by filing written notice of appeal with the city clerk of such city within ten days after the assessment roll shall have been confirmed, as aforesaid, and such notice shall describe the property and the objections of such appellant to such assessment; and, within ten days from the filing of such notice of appeal, the appellant shall file with the clerk of the superior court of the county in which such city may be situated a copy of such notice of appeal, a transcript of the assessment roll, of the objections thereto filed by him with the city clerk, as aforesaid, the order confirming such assessment roll, and the record of the council or other legislative body with reference to said assessment, which transcript shall be furnished and certified to by the city clerk as being a true copy of the original, upon payment of the necessary fees therefor. Such fees shall be the same as the fees payable to the county clerk for the preparation and certification of transcripts on appeal to the supreme court in civil actions. At the time of the filing of the transcript on appeal, the appellant shall execute and file with the clerk of the superior court a sufficient bond with at least two sureties (provided however, that any surety company authorized by the laws of the state of Washington to become surety upon appeal bonds shall be deemed sufficient security), to be approved by the judge of said court, conditioned to prosecute such appeal without delay and, if unsuccessful, to pay all costs to which the city is put by reason of such appeal. Such bonds shall be for a penal sum of not less than two hundred dollars. Said cause shall be docketed by the clerk of such court in the name of the person taking such appeal as plaintiff and against said city as defendant as 'an appeal from assessment.' Within three days after such transcript is filed in the superior court, as aforesaid, the appellant shall give written notice to the head of the legal department of such city, and to the city clerk, that such transcript is filed." Laws 1901, pp. 241, 242.

The grounds of the motion to dismiss in the court below are, in brief, these: (1) That the notice served on the head of the legal department of the city of Tacoma, and the city clerk of that city, was insufficient because it did not recite the names of all of the appellants, either in the title or in the body of the notice; (2) that the bond on appeal from the orders and ordinance of the city council to the superior court was filed with the clerk of the superior court two days prior to the filing of the transcript on appeal; and (3) that the several appellants have improperly joined in one appeal.

It hardly seems to us that any of these objections were well taken, nor do we think they merit an extended argument. The purpose of the notice is to inform the city attorney and the city clerk of the time when the transcript is filed with the clerk of the superior court, and of the time when the appeal will be called up for hearing before that court. Doubtless it would be better if the names of all of the appellants were recited therein, but it is too much to say that the right of appeal is lost if it is not done. The notice is not jurisdictional, and a substantial compliance therewith is sufficient.

Nor is it necessary that the transcript and bond be filed at the same instant, in order to perfect the appeal, notwithstanding the statute seems to so prescribe. The purpose of the bond is to secure the city in its costs in case the appellant is unsuccessful on his appeal, and the bond is just as effectual for that purpose when filed two days before the transcript is filed as it is when both are filed at the same time.

As to the last objection, we think it was the purpose of the statute to require that all appeals from an ordinance confirming an assessment for a local improvement should be heard at the same time in the superior court, to the end that the matter should be disposed of as speedily as possible. This being so, there can be no objection to the persons who object to the assessment joining in one notice of appeal, so

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long as the notice complies with the statutory requirement in stating the grounds of the several appeals.

The judgment appealed from is reversed, and the cause remanded, with instructions to reinstate the appeal.

MOUNT, C. J., HADLEY, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

(No. 5612. Decided July 18, 1905.)

MINNIE WAPPENSTEIN *et al.*, Respondents, v. THE CITY OF ABERDEEN, Appellant.¹

APPEAL—OBJECTIONS TO PLEADINGS—WAIVER OF ERROR. An objection that a complaint does not state facts sufficient to constitute a cause of action, cannot be first raised in the supreme court, where the defect is one that is capable of amendment, but is waived by answer and trial on the merits.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered September 6, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property by the change of a street grade. Affirmed.

R. E. Taggart and *E. E. Boner*, for appellant.

John C. Hogan, for respondents.

PER CURIAM.—This is an appeal from a judgment awarding the respondents damages caused their property by reason of a change in the grade of the street fronting thereon, made under the authority of the appellant city. The assignments of error raise but one question, namely, does the complaint state facts sufficient to constitute a cause of action. It is said that the complaint fails to state a cause of action because it fails to allege that the property had been improved with reference to the established grade. But if it be the rule that a municipality may make as many

¹Reported in 81 Pac. 686.

changes in the grade of a street as it pleases without subjecting itself to damages at the suit of property owners owning property fronting thereon, so long as the property has not been improved with reference to an established grade, and that a complaint asking for damages which fails to allege improvement of the property with reference to the established grade is defective, we think the appellant is estopped from urging the question on this appeal. The objection is raised for the first time in this court, and, as the defect is one that could have been cured by amendment, it was waived by answering over and going to trial on the merits.

The judgment is affirmed.

(No. 5489. Decided July 13, 1905.)

ROBERT MACK, *Appellant*, v. JOHN MACK *et al.*,
Respondents.¹

CONTRACTS—GRUBSTAKE—TRUST—ACCOUNTING—EVIDENCE—SUFFICIENCY. In an action between brothers for an accounting and the transfer of stock, the evidence is sufficient to show that the defendant held a one-third interest in a mining claim in trust for the plaintiff, where it appears that the claim was located in defendant's name and development work done by plaintiff under a grubstake agreement in consideration of a one-third interest, that defendant accounted to plaintiff for one-third of receipts from partial sales, and wrote letters acknowledging the trust; and it is error to dismiss the action.

SAME—STATUTE OF FRAUDS—AGREEMENT NOT IN WRITING. A contract whereby defendant grubstaked the plaintiff, who did development work upon a mining claim, in consideration of a one-third interest therein, which interest the defendant agreed to hold in trust for him, is not within the statute of frauds and need not be in writing.

SAME—ACCOUNTING—TRUST—EXPENDITURES IN CARING FOR JOINT PROPERTY. Where the locator of a mining claim held one-third thereof in trust for the plaintiff, in consideration of development work done,

¹Reported in 81 Pac. 707.

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Opinion Per CROW, J.

and subsequently expended money and time in caring for and managing the property, upon a sale of the property and an accounting, the trustee is entitled to one-third of the sum justly due for such disbursements and services, as a lien to be charged against the plaintiff's one-third interest in the proceeds.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 2, 1904, in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action to recover mining stock held in trust for plaintiff. Reversed.

Kirkpatrick, Price & Carver, and Barnes & Latimer, for appellant.

Danson & Huneke, for respondents.

Crow, J.—This action, brought by appellant, Robert Mack, against respondents John Mack, W. J. Morrison, The Athelstan Gold and Copper Mining Company, Ltd., and C. S. Slawson, was originally instituted in the superior court of King county, later transferred to Spokane county, and there tried upon the issues joined. The original complaint was so amended as to correct the name of the mining company in which an error had been made, and to bring in C. S. Slawson as defendant. Pending the action, restraining orders were made and served upon said W. J. Morrison, individually and as secretary of the corporation, and upon said John Mack and C. S. Slawson, to prevent the sale or transfer of certain mining stock hereinafter mentioned. Upon trial, the superior court, without making findings of fact or conclusions of law, dissolved said restraining order, dismissed the action, and entered judgment against appellant. From said final judgment, this appeal has been taken.

The vital questions involved on this appeal are purely questions of fact. This being an action in equity, it is now before us for examination *de novo* and determination upon the entire record. The trial court having failed to make any findings of fact or conclusions of law, there is nothing

before us to disclose the principles upon which the final judgment was entered, and we are now compelled to decide all questions of fact and weigh conflicting evidence without deriving any benefit from expressed views or findings of the trial court. As the conclusions at which we arrive do not agree with those of the honorable and learned trial judge, we find ourselves, in the absence of findings of fact or conclusions of law, unable to understand the theory upon which the action was dismissed. From the nature of defenses made, however, we conclude it must have been on some question of law rather than one of fact.

Having carefully examined the pleadings and evidence, upon consideration thereof, we find the facts to be, in brief, as follows: Appellant, Robert Mack, the respondent John Mack, and one William Mack, are brothers. During the year 1893, and for some time thereafter, Robert Mack and John Mack were locating mining claims in British Columbia, under an agreement whereby John was to defray all expenses, or do the "grub-staking," while Robert was to locate the claims, which they were to own, share and share alike. Under this agreement, a number of claims were located in the years 1893 and 1894. Afterwards, in the year 1896, John Mack, the respondent, went from Spokane to British Columbia, not for the primary purpose of locating additional claims, but for the purpose of having assessment work done on various properties owned by him in that locality. Before leaving Spokane, he, in conversation with Robert Mack, agreed that, if he located any additional ground on his trip, the same was to be located for himself and appellant. While in British Columbia, he had an interview with one William J. Porter, in which he requested said Porter to show him some valuable ground. Thereupon Porter agreed to do so, provided respondent would locate the same not only for respondent himself, but also for his brother Robert Mack. To this respondent assented, and thereupon Porter showed him certain ground and assisted him in locating the Athel-

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stan claim, now in dispute in this action. The location was made in the name of John Mack, and the claim continued at all times to stand in his name, except as hereinafter stated.

No particular work was done upon said claim by respondent at the time of its location, but in 1897 it became necessary to do the assessment work, and it was also deemed advisable to do further work for the purpose of development. About this time, Will Mack came from Indiana to Spokane, Washington, with the intention of going to British Columbia with his brother, the appellant Robert Mack, and assisting in doing assessment and development work on the Athelstan claim, with the understanding that he was to be paid going wages by John Mack for his services. Robert and Will procured an outfit and proceeded from Spokane to British Columbia, did the assessment work, also did a large amount of development work, and discovered a good ore body, showing the property to be very valuable. While they were on the claim, the respondent John Mack visited them for two or three days, and entered into a contract by which it was stipulated that the claim should be owned, one-third by himself, one-third by Robert, and one-third by Will, the development work then in progress to be done by Will and Robert without further compensation than their actual expenses, or grub-stake, which was to be furnished by John.

After the development work had been done by Robert and Will, the claim, by reason thereof, showed sufficient value to enable respondent John to bond it to the partnership firm of Crane & Loring, who were to pay \$15,000 for it, in the event of their taking up the bond. Crane & Loring did, in the year 1898, pay \$1,500 upon this bond, to the respondent John, who immediately paid \$500 to Robert and \$500 to Will. After this payment of \$1,500 had been made by Crane & Loring, the bond was forfeited by them, and the claim reverted to respondent John Mack. Some time

during the year 1900, the respondent John effected a sale of the claim to the Athelstan Gold and Copper Mining Company, Ltd., for \$3,000 cash and 350,000 shares of the paid-up capital stock of said company. Immediately thereafter John paid \$1,000 of said sum to the appellant Robert, \$1,000 to Will, and retained the remaining \$1,000 himself. About the same time he wrote separate letters to Will and Robert, in which he, in substance, stated that he held in his own name, in trust, in order that he might handle the same, said 350,000 shares of stock, one-third thereof for Robert, and one-third for Will.

About this time it seems to have been agreed between the three brothers that 50,000 shares of the stock was to be held for their father, leaving 300,000 shares for themselves. No further settlement was ever made between John and appellant Robert. Early in the year 1903, appellant wrote several letters to John, asking about his one-third interest in the stock, and requesting that the same be transferred to him. His letters were not answered, and thereupon he employed an attorney to write John and secure a settlement. John referred the attorney's letter to his own attorneys in Spokane, with the result that, after a brief correspondence, he denied any liability whatever, and insisted that appellant had no interest in the claim or the stock. Thereupon this action was commenced to recover the stock, which appellant claimed was held by respondent John as trustee for him.

Shortly after the correspondence between appellant and respondent John Mack had commenced, said respondent entered into a written contract with the respondent W. J. Morrison, whereby he agreed to sell said 350,000 shares of said capital stock to the said Morrison for four cents per share, or for the total sum of \$14,000, payable within twelve months from May 29, 1903, as follows: One and one-half cents per share on or about November 29, 1903, and two and one-half cents per share within six months there-

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after; and in pursuance of said contract the stock was placed in escrow in a bank in British Columbia.

The original complaint in this action was served upon the respondent John Mack about November 10, 1903, but was verified on the 4th day of November, 1903. At some time between the 4th and the 9th days of November, 1903, the respondent John Mack entered into an agreement with the respondent C. S. Slawson, whereby he sold his interest in the Morrison contract to said Slawson for \$10,000; \$5,000 being payable November 6, 1903, and \$5,000 January 1, 1904. It appears from the record that Slawson has paid the respondent John Mack in full for two-thirds of the stock under this contract, the remaining one-third, or 116,000 shares, being still held in escrow under a subsequent written agreement entered into between the respondent John Mack and said Slawson, to abide the result of this litigation.

Many of these facts which we find are disputed by respondent John Mack, but are supported by evidence of witnesses introduced on behalf of appellant. We are compelled to accept the statements of appellant and his witnesses, for the reason that they are clearly corroborated by undisputed facts and written evidence, while the evidence of John is in direct conflict therewith, and he admits that he had forgotten the contents of the letters written by him until they were produced in court. It is contended by the respondent John Mack that neither Robert nor Will ever had any valid or legal interest in or to the Athelstan claim or said mining stock. He insists that all payments to them from the proceeds of the Crane & Loring bond, and the sale to the mining company, were gifts, made by him with the sole intention of helping his brothers, who needed assistance, and that, by the statements contained in his letters, he only meant that, if he ever made any sale of the stock, he would help them further, but that he was under no legal obligation to do so. We cannot possibly see how these contentions can

be sustained, in the light of the undisputed fact that, at the time Robert and Will did the assessment work, he paid them nothing for their services, but only defrayed actual expenses; and the fact that, by statements contained in his letters, he clearly recognized their right to a one-third interest in the stock; and the fact that, in making settlement with them, he always paid them exactly one-third of the amounts received from the claim. We are forced to find that the position of the appellant has been sustained by the evidence, and in the absence of any assistance, from findings of fact or conclusions of law made by the trial court, to aid us in weighing the evidence, must so conclude.

Respondent John Mack, at the trial, further contended, and now contends, that the alleged contract under which appellant claims his one-third interest was not in writing, and was void, being within the statute of frauds. It may have been upon this theory that the trial court dismissed the action. We fail to see how the statute of frauds has any application whatever to the facts as found by us, and think there is no merit in respondent's contention. The contract which we find to have been entered into by John Mack and Robert Mack is enforceable, and not within the statute of frauds. *Raymond v. Johnson*, 17 Wash. 232, 49 Pac. 492, 61 Am. St. 908; *Eberle v. Carmichael*, 8 N. Mex. 696, 47 Pac. 717; *Gore v. McBrayer*, 18 Cal. 583; *Murley v. Ennis*, 2 Colo. 300; *Meylette v. Brennan*, 20 Colo. 242, 38 Pac. 75.

Another question appears in the record. Respondent John Mack, in his affirmative answer, pleads that, during the time he managed said claim and cared for the disputed interests therein, and in the Athelstan Gold and Copper Mining Company, Ltd., he made a considerable outlay of funds for necessary expenses, amounting to \$1,442, and also employed his own time to the value of \$2,000; and while he denies that appellant ever had any interest in said mining claim, or now has any interest in the stock, he asks,

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in the event of an adverse ruling against him on said issue, that he be decreed a lien upon said stock for the total sum of \$3,442, to compensate him for such disbursements and services. In our opinion he is entitled to a lien for such sums as may be justly due him. Upon a careful examination of the evidence, we find that he has made necessary and proper disbursements to the amount of \$724.50 in cash, and that he has put in time in caring for, looking after, and managing the property, to the value of \$1,000, being \$1,724.50 in all. Equitably one-third of this sum should be paid by the appellant Robert Mack, before he can be permitted to recover the stock which is held by John in trust for him.

As a block of 50,000 shares of this stock was to go to the father, we find that respondent John Mack now holds in his name, in trust for appellant, 100,000 shares of the paid-up capital stock of the Athelstan Gold and Copper Mining Company, Ltd., and that appellant is entitled to have the same transferred to him, upon paying to said respondent John Mack one-third of said sum of \$1,724.50, being \$578.17.

We find that error was committed in dismissing the action, and it is therefore ordered that the judgment of the honorable superior court be reversed, that this cause be remanded with instructions to enter a decree adjudging the appellant Robert Mack to be entitled to recover from the respondent John Mack 100,000 shares of the capital stock of said mining company, provided that, within ninety days after the filing of the remittitur from this court, said appellant shall first pay to the said respondent John Mack the said sum of \$578.17, with six per cent interest from the 4th day of September, 1903, the date of the commencement of this action; said decree to further provide that said respondent John Mack be adjudged to hold a lien upon said stock for said sum; and that, in the event said appellant shall not pay said sum within said ninety days, the said John Mack be

entitled to an order directing a sale of said stock, or so much thereof as may be necessary, to satisfy said sum of \$578.17 and interest. It is further ordered that the appellant recover his costs in the superior court, and also upon this appeal.

MOUNT, C. J., RUDKIN, ROOT, and DUNBAR, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

(No. 5538. Decided July 18, 1906.)

THE STATE OF WASHINGTON, *on the Relation of Tillie Bassett, Respondent, v. J. A. FREASURE, Justice of the Peace, Appellant.*¹

APPEAL—APPEALABLE ORDERS—AMOUNT IN CONTROVERSY. The supreme court has no jurisdiction of an appeal from an order of the superior court, reversing, on certiorari, a judgment of a justice of the peace, where the original amount in controversy did not exceed \$200, and the validity of a tax or statute was not involved.

Appeal from an order of the superior court for King county, Bell, J., entered October 3, 1904, after a hearing upon a writ of review, before the court without a jury, reversing and vacating the judgment of a justice of the peace. Appeal dismissed.

W. B. Osbourn, for appellant.

William C. Keith, for respondent.

PER CURIAM.—On the 1st day of October, 1904, the superior court of King county, on application for a writ of review, made an order directing one of the justices of the peace of said county to vacate and set aside a judgment theretofore rendered by said justice, and to grant a change of venue in the action in which the judgment was rendered. From this order the plaintiff appeals.

¹Reported in 81 Pac. 688.

30	198
30	897
30	198
40	476

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Syllabus.

The proceeding before the justice was a civil action at law for the recovery of a money judgment, where the original amount in controversy did not exceed the sum of \$200, and where the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute was not involved. Under the plain provisions of the constitution and the numerous decisions of this court, we have no jurisdiction of this appeal. *State ex rel. Gillette v. Superior Court*, 22 Wash. 496, 61 Pac. 158; *State ex rel. Wallace v. Superior Court*, 24 Wash. 605, 64 Pac. 778.

The appeal is therefore dismissed.

(No. 5557. Decided July 18, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. ANGUS J.
McPHAIL, *Appellant*.¹

CRIMINAL LAW—HOMICIDE—INSANITY—EVIDENCE—PREVIOUS ENCOUNTER—REBUTTAL TESTIMONY REFLECTING ON CHARACTER—OBJECTIONS. In a prosecution for murder, where the testimony of the accused supports a plea of insanity, superinduced by a blow on the head received six months previously in an encounter with a third person, evidence in rebuttal, offered to show the nature and extent of such injuries, is not objectionable as tending to prove the bad character of the accused, although unnecessary details of the trouble were received in evidence under one general objection that it was not proper rebuttal; since the evidence was strictly in rebuttal and competent for the purpose offered.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—PROVINCE OF JURY—SPECIFIC REQUEST. An instruction that the jury are judges of the credibility of the witnesses and the weight of the evidence, is proper and sufficient, in the absence of any specific request for an instruction that they are the "sole judges of the facts."

SAME—INSTRUCTIONS—TRIAL—WITHDRAWAL OF ISSUE AS TO LESSER DEGREE OF OFFENSE—COMMENT ON FACTS—WANT OF EVIDENCE. In a prosecution for murder in the first degree, an instruction to the jury that there is no evidence in the case to support a verdict of manslaughter, is not an unlawful comment on the facts, in violation

¹Reported in 81 Pac. 683.

of Const. art. 4, § 16; since the determination of the issues raised in a cause, and whether there is any evidence in support thereof, are questions of law and not of fact.

SAME—INSTRUCTIONS AS TO MANSLAUGHTER ON PROSECUTION FOR MURDER—NO EVIDENCE OF LESSER OFFENSE. In a prosecution for murder in the first degree, the court is not required to give any instructions upon the lesser offense of manslaughter, where there is no evidence on which to base such an instruction.

SAME—EVIDENCE OF MANSLAUGHTER—DEFENSE OF INSANITY. In a prosecution for murder in the first degree, there is no evidence that the accused was guilty of manslaughter, as defined by the statute, where it appears that he had ill feeling and had made threats against deceased, a rival in business, and after being in his place over an hour, without any apparent provocation, shot deceased in the back, inflicting a mortal wound, there being no defense except insanity.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered December 26, 1903, upon a trial and conviction of murder in the first degree. Affirmed.

Hathaway & Alston, for appellant.

J. W. Hartnett, for respondent.

RUDKIN, J.—The appellant was convicted of the crime of murder in the first degree, and from the judgment and sentence of the court, this appeal is prosecuted. It appears that the appellant and the deceased were rivals in the saloon business, at the town of Darrington, in Snohomish county. The appellant opened the first saloon in the town, and the competition caused by the saloon afterwards opened by the deceased curtailed the appellant's business, to such an extent as to cause considerable ill feeling on his part toward the deceased. On one or more occasions prior to the homicide, the appellant abused the deceased in public, called him vile names, and made threats of a more or less direct nature against him. On the 10th day of May, 1903, the appellant packed up his belongings with the intention of leaving the town. About 3:00 o'clock of that day, he repaired to the

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saloon of the deceased, accompanied by those who had been assisting him in packing up. After he had been in the saloon about an hour and a half, without any apparent provocation, he shot the deceased in the back, over the bar, inflicting a mortal wound, from which the deceased expired almost immediately. After firing the fatal shot, the appellant stepped around the end of the bar and fired a second shot in the direction of the prostrate form of the deceased. Counsel for appellant insist that there is a conflict in the testimony as to the firing of the second shot, but a careful reading of the evidence discloses no such conflict, if the fact be at all material. After the homicide, the appellant emptied two discharged shells and three loaded ones from his revolver, upon the floor, threw the revolver under a row of barrels in the saloon, and left the place. Some hours later he returned to the house where he had been stopping and was there apprehended.

We will now consider the various errors assigned in the order in which the rulings occurred at the trial.

(1) It is assigned as error that the court admitted evidence tending to prove the bad character of the appellant, although the appellant did not take the witness stand or put his character in issue. While the appellant interposed the general plea of not guilty, all the testimony offered in his behalf tended to establish the defense of insanity. It was claimed on the part of the appellant that he was insane at the time of the homicide, and that such insanity was super-induced, in part at least, by blows which he had received on the head some six months before, in an encounter with one Gallagher. In rebuttal the state offered testimony tending to show the nature and extent of the injuries inflicted upon the appellant in such encounter, but disclaimed any right to prove anything beyond this. It is true, the witnesses went into the details of the trouble between the appellant and Gallagher further than was necessary for that purpose, but the only objection interposed was the general one that

the testimony was not proper rebuttal. This testimony was clearly competent for the purpose for which it was offered, and was strictly in rebuttal of the defense interposed by the appellant. There was no error in this ruling.

(2) The court instructed the jury as follows: "You are the judges of the credibility of the witnesses and the weight to be attached to the testimony of each and all of them." The appellant contends that the jury should have been instructed that they were the sole judges of the facts. The charge given was correct as far as it went, and if the appellant desired a more specific charge, or a charge in the language of the statute, he should have requested it. There was no error in the charge as given.

(3) The court further instructed the jury that they might find the appellant guilty of murder in the first degree, guilty of murder in the second degree, or not guilty; but that there was no evidence in the case to support or justify a verdict of guilty of manslaughter. Counsel for appellant earnestly insist that this instruction was a comment on the facts, in violation of art. 4, § 16, of the state constitution, which provides that, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

It seems to us that counsel labor under an entire misapprehension as to the purpose and effect of this constitutional provision. It relates only to the manner of conducting trials and submitting questions of fact to juries, and does not limit the power of the courts in the determination of questions of law. In this, as in all other jurisdictions, the court must determine the issues to be submitted to the jury from the pleadings and proofs, and in making such determination it decides matters of law and not matters of fact. If the court improperly withdraws an issue from the consideration of the jury, its ruling is erroneous, not because it is a comment on the facts, or a charge with respect to matters of fact, in violation of the provision quoted, but because it deprives

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the parties of a trial by jury, in violation of section 21 or section 22 of art. 1 of the constitution, which provide that the right of trial by jury shall remain inviolate, and that in criminal prosecutions the accused shall have a speedy public trial by an impartial jury.

The provision upon which counsel rely applies to both civil and criminal cases, and, if they are correct in their contention, this court has been in error throughout its entire existence in holding that whether there is any testimony to support a cause of action or a defense presents a question of law for the determination of the court, and not a question of fact for the jury. The position taken by counsel is that the trial court must submit every issue raised by the pleadings to the jury, regardless of the state of the testimony or the absence of all testimony. This contention finds no support in our constitution or elsewhere, and cannot prevail. It is true, Bal. Code, § 6955, provides that,

“Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense;”

but similar statutes exist in the United States, and in all the states, and the decisions are practically uniform to the effect that a defendant can only be convicted of a lesser degree, or of an attempt, when there is testimony to sustain such a conviction. The information before us charges the the crime of assault, and assault and battery, but it would be an anomaly to hold that insanity excused the homicide but did not excuse the assault or the battery which was the direct and proximate cause of the homicide. The rule on the subject under consideration is thus stated in 11 Ency. Plead. & Prac., p. 211:

“On a criminal prosecution, it is not necessary for the court of its own motion, or on request, to instruct as to the lower grades of crime involved, where there is no evi-

dence on which to base such an instruction. The giving of such an instruction is not only unnecessary but improper."

This rule is fully sustained by the authorities. *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273; *Andersen v. United States*, 170 U. S. 481, 18 Sup. Ct. 689; *Davis v. United States*, 165 U. S. 373, 17 Sup. Ct. 360. The last case cited is very similar to the case at bar. In stating the facts, Mr. Justice Brewer says:

"The principal defence presented on this trial, as on the former, was insanity. Indeed the circumstances of the homicide were such as to preclude any other. The deceased, peacefully at work, unarmed and making no demonstrations against the defendant, was shot and killed by the latter, and this in consequence of a dispute more than a week old. The act thus done, if done by a man fully responsible for his actions, was unquestionably murder in the first degree."

And on the refusal of the court to instruct as to manslaughter the court says:

"The last instruction asked was in reference to manslaughter. But under the evidence, there was no occasion for any statement of the law on this. There was no testimony to reduce the offence, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions there was nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed it would simply have been confusing the minds of the jury) to give an instruction upon a matter which was not really open for their consideration."

To the same effect, see, *Foster v. People*, 50 N. Y. 598; *People v. Barry*, 90 Cal. 41, 27 Pac. 62; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *Clark v. Commonwealth*, 123 Pa. St. 555, 16 Atl. 795; *State v. Lane*, 64 Mo. 319; *McCoy v. State*, 27 Tex. App. 415, 11 S. W. 454; *State v. McKinney*, 111 N. C. 683, 16 S. E. 235; *Jones v. State*, 52 Ark. 345, 12 S. W. 704; *McClernand v. Commonwealth*, 11 Ky. Law 301, 12 S. W. 148; *O'Brien v. Commonwealth*, 89 Ky. 354, 12 S. W. 471; *State v. Estep*, 44 Kan. 572,

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24 Pac. 986; *Robinson v. State*, 84 Ga. 674, 11 S. E. 544; *State v. Cole*, 63 Iowa 695, 17 N. W. 183.

As heretofore stated, there is nothing in our constitution rendering these decisions inapplicable in this state. Our own decisions are in harmony with the cases cited. In *State v. Dolan*, 17 Wash. 499, 50 Pac. 472, and *State v. Young*, 22 Wash. 273, 60 Pac. 650, the court held that it was error to refuse to submit to the jury the inferior degrees of the crime charged, but in each case there was testimony to sustain a verdict for such inferior degrees. In *State v. Bailey*, 31 Wash. 89, 71 Pac. 715, a prosecution for a rape, the court held that it was not error to fail to instruct the jury that they might find the defendant guilty of assault, or assault and battery, because there was no testimony tending to support these lesser offenses. The court cited with approval from *State v. Wood*, 124 Mo. 412, 27 S. W. 1114,

"There was nothing in the evidence calling for an instruction on the lower grade for an assault to kill, . . . and under such circumstances the court should not invite the jury to find for a lower grade than is made by the evidence."

Was there any testimony in this case tending to prove that the defendant was guilty of manslaughter? Manslaughter is defined by our statute as the unlawful killing of a human being, without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily but in the commission of some unlawful act. All the facts in relation to the homicide are stated above, and there is not the slightest testimony of any kind in justification or mitigation. The appellant was either insane, or he was guilty of murder in the first or second degree, and the court committed no error in so charging.

In concluding this branch of the case we will only add that, if there is any testimony tending to prove the inferior degrees of the crime charged in the information, the court must submit such inferior degrees to the jury by proper

instructions; but if there is no testimony tending to prove the commission of any of the lesser crimes charged, the court is not required to submit such lesser crimes to the jury, and commits no error in its refusal so to do. A party has no constitutional right to a compromise verdict which is not supported by any testimony. Indeed, in *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902, a prosecution for murder, it was held, that under the facts there presented, the defendant was guilty of murder or not guilty, and that a verdict for manslaughter was not supported by any testimony and was tantamount to a verdict of not guilty. The defendant was accordingly discharged.

In answer to the contention that, if the court may withdraw one degree of the crime from the jury, it may withdraw all and direct a verdict of guilty, we need only repeat the language of Judge McCrary, in *United States v. Taylor*, 3 McCrary 500, approved by the supreme court of the United States in *Sparf v. United States*, *supra*:

"In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly."

Counsel for respondent insists that the appellant was not prejudiced by the refusal of the court to submit the question of manslaughter to the jury, inasmuch as the jury returned a verdict of guilty of murder in the first degree; whereas the jury might have returned a verdict in the sec-

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ond degree, had they been so inclined. There is great force in this contention, but we prefer to rest our decision upon the ground upon which it was based in the court below.

The only remaining error discussed was the order denying appellant's motion for a new trial. In so far as the motion for a new trial was based on the rulings already discussed, it was properly denied. The only other question presented in support of the motion is the sufficiency of the evidence to sustain the verdict. As already stated, the only substantial issue presented at the trial was the sanity or insanity of the appellant. The jury reached the conclusion that he was sane and responsible for his acts, and there is no apparent reason why this court should interfere with their verdict, which is supported by ample and competent testimony.

Finding no error in the record the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

(No. 5537. Decided July 18, 1905.)

MARIAN E. PETERSON, *Respondent*, v. JAMES SLOSS,
Appellant.¹

VENDOR AND PURCHASER—DEED BEFORE PATENT—RECORDING—CHAIN OF TITLE—NOTICE TO SUBSEQUENT PURCHASERS. A deed by a homesteader prior to patent, after final proof and the issuance of the receiver's final receipt, is in the chain of title, although the receiver's receipt was not recorded, and the same transfers equitable title; and subsequent purchasers after issuance and recording of the patent are bound by the record of such former deed, from the patentee, although they had no actual notice thereof.

SAME—PARTITION—PRIOR PURCHASERS. A partition agreement, made by a tenant in common after contracting to convey his interests, is not binding upon subsequent purchasers from his grantee.

Appeal from a judgment of the superior court for King county, Bell, J., entered November '1, 1904, upon findings

¹Reported in 81 Pac. 744.

in favor of the plaintiff, after a trial before the court without a jury, in an action to quiet title. Reversed.

E. C. Kriete and Steele & Brown (S. H. Steele, of counsel), for appellant.

W. L. Waters, for respondent.

RUDKIN, J.—On the 19th day of November, 1895, after completing his five years' residence, one Rowland Evans made final proof for the southeast quarter of section 28, township 23 north, range 7 east, W. M., in King county, Washington, and received a receiver's final receipt therefor. This receipt was never filed for record. On November 27, 1895, Evans conveyed an undivided one-half interest in said tract to the defendant James Sloss. The deed of conveyance was filed for record in the office of the county auditor of King county, on December 7, 1895. On the 26th day of October, 1901, Evans entered into an agreement with the defendants S. D. Fraser and J. J. Fraser, whereby Evans agreed to convey the entire tract to the Frasers. This agreement was filed for record on the 2d day of November, 1901. On the 6th day of September, 1902, a deed of conveyance of the entire tract was executed by Evans to the Frasers, and was filed for record on the same day. On the 25th day of March, 1903, the Frasers conveyed the entire tract to the plaintiff, Marian E. Peterson. This deed was filed for record on March 27, 1903. The plaintiff, Peterson, purchased the property for a valuable consideration, and without actual notice of the prior conveyance of an undivided one-half interest in the property from Evans to Sloss. On the 13th day of July, 1899, a homestead patent issued to Evans for said tract, and was filed for record in the auditor's office on the 27th day of March, 1903. On the 21st day of March, 1902, Evans and Sloss entered into an agreement partitioning said tract between themselves, which agreement was filed for record on the 6th day of May, 1903.

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At the time of the commencement of this action, the land was vacant and unoccupied. The object of the action was to declare the plaintiff the owner in fee of the entire tract, and to remove a cloud from the title. The plaintiff had judgment according to the prayer of her complaint, and the defendant Sloss appeals.

The sole question presented on this appeal is this: Was the record of the deed of November 27, 1895, from Evans to the appellant Sloss, constructive notice of the claim of appellant, as against subsequent purchasers from Evans? We think that it was. Both parties place reliance on *Sayward v. Thompson*, 11 Wash. 706, 40 Pac. 379. In that case the respondents claimed title by mesne conveyances from the patentee of the government. The appellant claimed title under an indorsement on the final receipt to the effect that the holder of the receipt had sold all his right, title, and interest in the property therein described to one Meigs. This indorsement was neither acknowledged nor recorded. That case is not, therefore, directly in point here. In the opinion, however, the court says:

"By omitting to take a formal conveyance and to have the same recorded when he might well have done so, we think Meigs was guilty of negligence and that appellant cannot be heard to say that the paper which Meigs elected to take was not such as the law entitled to be recorded," thereby implying, at least, that, if Meigs had taken a formal conveyance and recorded the same, he and his grantees would have been protected. That was just the precaution taken by the appellant in this case. We find no fault with the authorities cited by the respondent, and agree with her counsel that the record is not constructive notice of a deed without the chain of title. We cannot agree, however, that the conveyance made by the holder of the receiver's receipt was without the chain of title. A conveyance made by a party before he acquires title to the property conveyed is,

no doubt, without the chain of title, and had the patent in this case been the origin of Evans' title, the rule contended for would apply. The patent, however, was issued under the homestead law, and the respondent and her grantors knew, and were chargeable with notice, that the patent was preceded by final proof, and that the entryman had full power to convey or incur the property at any time after final proof was made. How would the recording of the final receipt have availed the respondent? True, it would fix a time beyond which she need not look for conveyances by the entryman, but nothing more. She knew that Evans had title and the right to convey before the patent issued, and it was her duty to examine the record for such conveyances. Had she done so, she would have discovered the deed to Sloss. Having failed in this, she failed in her duty, and must suffer the consequences. The deed from Evans to Sloss was executed at a time when Evans had full power and authority to execute the same, and the patent itself gave ample notice of such preexisting title and the incidental right to convey. The title was an equitable one, it is true, but the right to transfer it is acknowledged by all the authorities.

The appellant asks to be awarded the portion of the property allotted to him under the partition agreement between himself and Evans; but, inasmuch as this agreement was made after the agreement on the part of Evans to convey the property to the Frasers was executed and recorded, such partition is not binding upon the respondent unless she elects to ratify it.

The judgment is reversed, with directions to enter a decree declaring the respondent the owner of an undivided one-half interest in the property in controversy, unless the parties agree upon some other disposition of the case.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

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(No. 5485. Decided July 18, 1905.)

CHRISTIAN JOHNSON *et al.*, Appellants, v. SEATTLE ELECTRIC
COMPANY, Respondent.¹

DEATH BY WRONGFUL ACT—RIGHT OF ACTION—HEIRS LIMITED TO WIDOW AND CHILDREN—STARE DECISIS. Upon the principle of *stare decisis*, the word "heirs" in Bal. Code, § 4828, descriptive of the persons who may maintain actions for the wrongful death of another, is restricted to the widow and children of the deceased, and cannot be extended to the widower on the principle that widow and widower can be used interchangeably in the statute.

ACTIONS—JOINER—FOR DEATH BY WRONGFUL ACT AND FUNERAL EXPENSES—FATHER AND SON PLAINTIFFS. A right of action in favor of a widower for funeral expenses, against one who caused the wrongful death of his wife, cannot be joined with an action under the statute by a minor son for the death of his mother.

PLEADING—DEMURRER—TRIAL—DISMISSAL ON FAILURE TO AMEND. Where two causes of action are improperly joined, and a demurrer on that ground is sustained, a plaintiff whose complaint stated a good cause of action cannot complain of the dismissal of the action upon sustaining the demurrer, when he elected not to amend his complaint.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 28, 1904, dismissing an action for damages for wrongful death, upon sustaining a demurrer to the complaint. Affirmed.

George Fowler and Root, Palmer & Brown, for appellants.
Hughes, McMicken, Dovell & Ramsey, for respondent.

HADLEY, J.—The plaintiffs in this action are, respectively, the surviving husband and minor son of Mattie Johnson, deceased. They jointly brought this action to recover damages on account of the death of said Mattie Johnson. They allege that death resulted from injuries received by her in a street railway accident, in Seattle, while she was a passenger upon one of the defendant's cars. In addition to

¹Reported in 81 Pac. 705.

general damages, the plaintiffs allege that they have incurred great expense in and about the funeral and burial of the deceased, and that they have been damaged thereby.

The defendant demurred to the complaint upon two grounds, (1) that several causes of action have been improperly united; (2) that the complaint does not state facts sufficient to constitute a cause of action as to Christian Johnson. The demurrer was sustained. The order sustaining the demurrer recites that, in the opinion of the court, the claim for damages for the loss of the services, society, nurture, and counsel of the deceased is a separate and distinct cause of action from the claim for recovery on account of funeral and burial expenses; that the plaintiff Christian Johnson, the surviving husband, has no interest in the first mentioned claim; that the plaintiff Merinus Colmer Johnson, the minor son, has no interest in the last mentioned claim, and that, therefore, said two claims cannot be properly prosecuted in the same action. The demurrer was sustained on the ground that several causes of action were improperly united in the complaint. The order gave the plaintiffs leave to amend their complaint, but they elected not to amend and, on motion of the defendant for judgment against the plaintiffs, the motion was granted, and judgment was entered that plaintiffs shall take nothing by their action. They have appealed from the judgment.

Appellants urge that the surviving husband has a cause of action for the death of his wife, and that he may join with the child in bringing suit for such death, within the terms of Bal. Code, § 4828. This court held, in *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, that the word "heirs," as used in that statute descriptive of the persons who may maintain actions for the death of others, is restricted to the widow and children of the deceased. That construction was followed in *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141, and was approvingly mentioned in *Robinson v. Baltimore & S. Min.*

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etc. Co., 26 Wash. 484, 67 Pac. 274. The still later case of *Manning v. Tacoma R. & Power Co.*, 34 Wash. 406, 75 Pac. 994, was appealed to this court for the frankly avowed purpose of effecting a reinvestigation of the question, to the end that *Noble v. Seattle*, *supra*, might be overruled. In that case the court declined to reopen the subject, and declared that it considered the question as settled under the rule of *stare decisis*.

Appellants say, however, that the rights of a surviving husband have not been involved in any of the decided cases. In the first case cited, the suit was brought by the father and mother of the deceased; in the second, by the mother; and in the last, by the mother. The third case mentioned was not one directly involving a construction of the statute, since it was brought by the surviving widow and children, as to whose right to sue no question has ever been raised. It appears, therefore, that no case has before been presented to this court where the surviving husband was seeking by authority of this statute to recover for the death of his wife. Appellants argue that it is the spirit and intent of the statute that the widower and minor children shall be accorded the same rights in case of the wrongful death of the wife and mother as are given to the widow and minor children in case of the wrongful death of the husband and father. It is insisted that, under our community property system, which gives to the spouses equal shares of all that is acquired by their joint efforts, it follows that they are of equal value to each other, and that the death of the wife must, in legal contemplation, constitute a pecuniary loss to the husband, exactly equal to her loss in case of his death.

We need not undertake to analyze the argument. Whether it be sound or not is a question for legislative consideration. The right of either husband or wife to sue for the death of the other must depend upon legislation authorizing it, and if the statute in question does not authorize the husband to sue, then appellants' argument as to the mutual per-

sonal and property relations of the two is of no avail. Under the rule of *stare decisis*, we think this cannot be said to be an open question. When the court formerly reached the conclusion that the word "heirs," as used in the statute, did not include parents, it did so only upon the theory that the term was limited to the persons theretofore specifically mentioned in the statute. In *Noble v. Seattle*, *supra*, the argument was concluded as follows:

" . . . the word 'heirs,' as used in § 138, should be held to include only those persons who are thereinbefore specifically mentioned, viz.: 'The widow or widow and her children, or child or children if no widow.' "

Discussing the subject of *stare decisis*, in 26 Am. & Eng. Ency. Law (2d ed.), 171, the writer says:

"A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided."

See, also, *School Trustees v. Stocker*, 42 N. J. L. 115. In *Brown v. Chicago etc. R. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, the court said:

"It is a mistaken opinion that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and considered, and deliberately decided by the court leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved."

With the construction already given this statute by this court, it cannot be held that the legislature intended to confer a right of action upon a surviving husband. If it had intended to confer so valuable a right upon a widower in his own behalf, it would doubtless have so said in express terms.

Appellants cite decisions of this court to the point that "widow" and "widower" may become interchangeable terms in a statute. In *Re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109; In *re Feas' Estate*, 30 Wash. 51, 70 Pac. 270. In

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those cases the benefit of the children was the manifest end sought by the statute, and not a direct benefit to the surviving husband. To effect the purpose of the statute it became necessary to read the word "widow" as "widower." Unless the legislative intention to use the terms interchangeably is manifest, they should not be so considered. For especially apt reasoning in this connection, we refer to *Western Union Tel. Co. v. McGill*, 57 Fed. 699, 21 L. R. A. 818. Judge Sanborn, in delivering the opinion of the United States circuit court of appeals, eighth circuit, in that case, involving the Kansas statute relating to actions of this character, reviewed an argument made by counsel similar to that made by appellants here. The statute under consideration was as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The court was urged to hold that the word "widow," as used in the above statute, should be construed to mean "widower" in cases where the wife has been killed. Discussing that argument, the court said as follows:

"Finally, it is said that the word 'widow' in this statute ought to be construed to mean 'widower' in every case where the wife has been killed; that the legislature must have intended to include him in the class of the widow and children, because he must often suffer great pecuniary loss by the death of his wife. If there was any ambiguity in this statute, we might speculate on the probable intention of the legislature, and consider who ought to be added to the first class which they have formed. We might consider that, where a husband is killed, who is the only support of aged

and infirm parents who have spent the best years of their lives to educate him and establish him in business, every consideration of justice and humanity demands that these parents should be counted as members of the class of the widow and children; that when a married woman is killed, whose kindness, sympathy, and care have furnished the only consolation and support of an invalid sister, she ought to be added to this class; and that in every case those who suffer most severely from the death should be deemed the widow and children of the deceased, and should receive the exclusive benefit of the recovery in the action.

"If we entered upon this inquiry it would not fail to occur to us, however, that when the legislature gave these damages to the widow and children they may have considered that the husband is, and ought to be, the provider for and supporter of the family; that his death often leaves the widow and children helpless, without the power to earn the means needed to purchase the necessities and comforts of life; that the burden of supporting and providing for the family is seldom cast upon the wife; that, where it is, the husband is sometimes unworthy to share in the damages for her death, and they ought to go to the children exclusively, and that, where it is not, her death will not be the pecuniary loss to the family that the death of the husband must have been, since the supporter of the family still remains, and can provide the means for its support. We shall not enter upon these speculations. They present matters proper for the consideration of the legislature of the state of Kansas, but the terms of the statute are too clear to permit us to indulge in them. This statute does not put in its first class the infirm parents, the invalid sister, or the bereaved husband. It places no one there but the widow and children. To the pressing invitation to us to add others to the list, we answer in the words of the supreme court of Kansas: 'We do not make the law. If there is any omission in the statutes, the remedy is with the legislature.' *Limekiller v. Railroad Co.*, 33 Kan. 83, 5 Pac. 401."

Christian Johnson had, therefore, no cause of action for the loss of his wife. Respondent concedes that he is entitled to recover any amount he may have paid for funeral expenses, but urges that he cannot join his action therefor

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with the action on behalf of the minor child for the loss of the mother. In this view we concur. If the father paid the amount from his own estate, then he is entitled to recover it for his own use. If it was paid from the community estate, in which appellants say the child has an interest, then it is recoverable by an administrator of the community estate. In any event, therefore, the causes of action are improperly joined. It is urged that the cause of action in favor of the minor son for the loss of his mother should have been permitted to stand. It was, however, improperly joined with another. This is a statutory ground of demurrer, and the demurrer was properly sustained upon that ground. The order sustaining the demurrer gave leave to amend, so that the son might have separately stated his cause of action. He declined to amend, and there remained nothing for the court to do but render judgment for the respondent.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, and DUNBAR, JJ., concur.

Root, J., being disqualified, took no part.

(No. 5539. Decided July 18, 1905.)

THOMAS H. WILLIAMS, *Executor of the Will of William Tester, Deceased, Respondent*, v. C. H. PACKARD, *et al., Appellants*.¹

JUDGMENTS—REVIVAL—CHANGE OF LAW—CONTRACTS—IMPAIRMENT OF OBLIGATION—STATUTES—REPEAL. The act of 1897 repealing the law for the revival of judgments, was an impairment of the obligation of, and unconstitutional as to, existing contracts, and a judgment thereon, although entered after the passage of the act, may be revived on motion notwithstanding the repealing statute.

¹Reported in 81 Pac. 710.

Appeal from an order of the superior court for Snohomish county, Denney, J., entered July 21, 1904, reviving the lien of a judgment, upon motion of the plaintiff, after overruling a demurrer to the motion. Affirmed.

Bostwick & Mulvihill, for appellants.

McGuinness & Miller, for respondent.

HADLEY, J.—This appeal involves the revival of a judgment. The original judgment was rendered November 30, 1897. On March 21, 1903, a motion to revive and continue was filed in the cause. The motion recites that, since the entry of the judgment, the plaintiff in the action died, intestate; that Robert Smallman and Thomas H. Williams, being designated by the will as executors thereof, were duly appointed as such, and that they have been the duly qualified and acting executors of the estate since the 8th day of September, 1900. The motion was verified by said Robert Smallman. After the filing of the motion, said Robert Smallman died and, by consent of the defendants, said Thomas H. Williams, as executor, was substituted as the party plaintiff instead of the plaintiff William Tester, deceased. The motion further recites that the judgment remains unreversed and unsatisfied; that there has been paid thereon the sum of \$355; and that there is still due and unpaid a balance of \$1,301.10, with interest and costs. The defendants demurred to the motion, and the same was overruled. Thereafter, on June 21, 1904, an order was entered reviving the judgment in the total sum, including principal and interest, of \$1,906.54, together with costs of the revival proceeding. The defendant C. H. Packard has appealed from the order of revival.

It is assigned that the court erred in overruling the demurrer to the motion to revive, and also in entering the order of revival. These may be discussed together. This proceeding is prosecuted under 2 Hill's Code, §§ 462, 463.

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Section 463 provides that the revival proceeding may be commenced within six years from the rendition of the judgment. This proceeding was so commenced. The legislature of 1897 provided that, after the expiration of six years from the rendition of any judgment, it shall cease to be a lien or charge against the estate or person of the judgment debtor, and that no proceedings shall ever be had by which the duration of a judgment shall be extended or continued in force for any longer period than six years from the date of the original judgment. Bal. Code, §§ 5148, 5149. This court has held that, as to judgments existing prior to that law, the statute is unconstitutional as impairing the obligations of contracts. *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104.

The original judgment in the case at bar was rendered after the statute of 1897 took effect. The appellant argues that the record here does not show that the judgment was founded upon a contract, and that, for aught that appears, it may have been founded upon a tort. The motion for revival was, however, filed in the original cause, and the first paragraph of the motion expressly refers to the judgment, and makes it a part thereof. A supplemental transcript brought here by respondent sets out the judgment itself, together with the court's findings, by which it appears that the judgment was upon a promissory note, which was secured by mortgage upon personal property. A decree was also entered foreclosing the mortgage. The findings show that the note and mortgage were executed September 5, 1893. The judgment was therefore founded upon a contract which existed prior to the law of 1897.

If, as has been held, that statute is void as to judgments existing when the law took effect, for the reason that it impairs the obligations of the contracts upon which the judgments were founded, then is it void as to judgments rendered

after the new law was in force, but founded upon contracts executed prior to that law? The contract is the principal thing, and the judgment exists by reason of the contract. The reason assigned for the decisions above cited was that the new law impaired the value of the contracts themselves, and no distinction in principle can be made in this connection between prior contracts which were merged in judgments before the new law and similar ones which were not. The value of the contract is affected in the one case as much as in the other. In *Swinburne v. Mills*, 17 Wash. 611, 50 Pac. 489, 61 Am. St. 932, it was held that the laws existing at the time of making a contract enter into it and become a part of it, and that one who is entitled to enforce the obligation of a contract is also entitled to protection against a change in existing remedies, when their nature and extent are so changed as to materially affect his rights under his contract as they existed when it was made. See, also, *Canadian etc. Trust Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. 946. The principle discussed and decided in the above cases is controlling here, and the precise question involved in this case was also decided adversely to appellants' contention in *Fischer v. Kittinger*, ante p. 174, 81 Pac. 557, filed July 14, 1905. It was therefore not error to revive this judgment in pursuance of the law which entered into, and became a part of, the contract from its inception.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

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(No. 5443. Decided July 18, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. P. H. NELSON,
Appellant.¹

CRIMINAL LAW—ADULTERY—INFORMATION—ERRONEOUS DESIGNATION OF OFFENSE—LIVING IN A STATE OF ADULTERY. An information plainly charging the offense of living in a state of adultery, is not defective on account of a recitation erroneously designating the offense as the crime of adultery, which is not punishable under our statutes.

SAME—CERTAINTY. An information is not uncertain in that it may charge the offenses of adultery, living in a state of adultery, cohabitation, or lewdness, when the intent to charge the offense of living in a state of adultery is plain to a person of common understanding.

SAME. Such an information is not bad for duplicity.

SAME—PARTIES DEFENDANT. In a prosecution for living in a state of adultery, it is not necessary to join the alleged paramour as a defendant.

SAME—CERTAINTY AS TO TIME. An information for living in a state of adultery, charging the commission of the crime between certain dates, is not uncertain as to time.

CRIMINAL LAW—ORDERS—RECITALS—COPY OF INFORMATION. An order of arraignment reciting the delivery of a copy of the information cannot be contradicted by *ex parte* affidavits.

SAME—ADULTERY—EVIDENCE OF PREVIOUS ACTS. In a prosecution for living in a state of adultery, the conduct of the parties previous to the date charged may be shown.

SAME—MARRIAGE OF PARAMOUR—HARMLESS ERROR. In a prosecution for living in a state of adultery, the state has a right to prove the marriage of the alleged paramour and the absence of her husband, as part of the surrounding circumstances; and if the marriage was immaterial, it was not prejudicial.

SAME—ADULTERY OF PARAMOUR—BIRTH OF CHILD—HARMLESS ERROR. In a prosecution for living in a state of adultery with a married woman, it is competent for the state to prove that she gave birth to a child more than twenty months after she had seen or cohabited with her husband, as one step toward proving the ultimate fact of adultery with the accused; and if he was not connected therewith he was not prejudiced.

¹Reported in 81 Pac. 721.

SAME—MARRIAGE—EVIDENCE OF—COMPETENCY. Testimony tending to show a marriage by a minister of the gospel, that the parties then promised to take each other as husband and wife, and continually lived together and held themselves out as such, is competent proof of a marriage; the statutory provision for proof by certificate being cumulative.

TRIAL—OBJECTIONS TO TESTIMONY—SUFFICIENCY—APPEAL AND ERROR—REVIEW. Where it is sought to qualify a former wife as a witness by showing a divorce, an objection that evidence offered to prove the divorce was "incompetent, irrelevant and immaterial," does not raise the objection that it was not the best evidence, and will not be entertained for the first time in the supreme court.

WITNESSES—COMPETENCY—DIVORCED WIFE. The divorced wife of the accused is a competent witness against him, except as to communications during marriage.

SAME—HUSBAND OF PARAMOUR—ADULTERY—EVIDENCE. The husband of the alleged paramour of the accused is a competent witness against one accused of living in a state of adultery, when the paramour is not on trial or charged with crime.

SAME—ADULTERY—EVIDENCE—LETTERS OF PARAMOUR TO HUSBAND—LOSS OF PRIVILEGE—IMPEACHMENT OF WITNESS. Where an alleged paramour was offered as a witness to prove that she had not lived in a state of adultery with the accused, a letter written to her husband, inconsistent with her testimony, loses its character as a privileged communication when it is produced by the officers of the state, and is competent for the purposes of impeachment.

Appeal from a judgment of the superior court for King county, Hatch, J., entered July 5, 1905, upon a trial and conviction of the crime of living in a state of adultery. Affirmed.

James E. Bradford, for appellant.

Kenneth Mackintosh and *Hermon W. Craven*, for respondent.

RUDKIN, J.—The defendant was convicted of the crime of living in a state of adultery, and prosecutes an appeal from the judgment and sentence of the court. The information recites that the appellant is accused of the crime of adultery committed as follows:

"He, the said P. H. Nelson, in the county of King, State of Washington, on the 25th day of May, 1903, and thence

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continuously until about the 15th day of July, 1903, did wilfully, unlawfully and feloniously live and cohabit in an open and notorious state of adultery with one Paulina Smith, and did then and there have carnal knowledge of the body of the said Paulina Smith, the said Paulina Smith being then and there a female person other than the wife of the said P. H. Nelson, and being then and there the lawful wife of Barney Smith, then and there living in Alaska, and the said P. H. Nelson having then and there a lawful wife living in Seattle, King county, Washington, to wit: one Julia Nelson."

The appellant urges several objections to the sufficiency of this information.

(1) It is claimed that the information charges the crime of adultery, and that there is no such crime under the laws of this state. True, the information recites that the appellant is accused of the crime of adultery, but the sufficiency of an information does not depend upon the name by which the prosecuting officer may designate the crime. A wrong designation of the crime charged, or the absence of all designation, will not vitiate an information which is otherwise sufficient. The information before us plainly charges the crime of living in a state of adultery under Bal. Code, § 7231, and is therefore sufficient.

(2) It is claimed that it is uncertain whether the information charges a crime under Bal. Code, § 7230, § 7231, or § 7238. Section 7230 defines adultery, but does not define any crime or prescribe any penalty. Section 7231 defines the crime of living in a state of adultery. Section 7238 defines the crime of lewd and vicious association and cohabitation by unmarried persons, or open and gross lewdness or indecent or obscene exposure of his or her person, or of the person of another, by any man or woman married or unmarried. It seems to us a person of common understanding can readily understand what is intended by this information and what crime is charged. If so, the requirements of the law are satisfied.

(3) It is claimed that Paulina Smith should have been joined as a defendant. This was unnecessary. Bishop, Statutory Crimes (3d ed.), § 670; Wharton, Crim. Law (10th ed.), § 1730; 1 Ency. Plead. & Prac., p. 308; *State v. Dingee*, 17 Iowa 232.

(4) It is urged that the information is uncertain as to time. Where an information charges a continuing offense, such as living in a state of adultery, it is proper to allege the commission of the crime between certain dates as was done in this case. *State v. Way*, 5 Neb. 283; *Commonwealth v. Wood*, 4 Gray 11.

(5) Again it is urged that the information is bad for duplicity. This assignment is answered by what has been said as to uncertainty as to the crime charged, as is also the further assignment that the court should have required the state to elect between the different crimes charged. As we view the information it charges but one crime in one form only.

(6) It is claimed that the appellant was not furnished with a copy of the information. The order of arraignment recites that a certified copy of the information was delivered to the appellant in open court and this record cannot be contradicted by an *ex parte* affidavit.

(7) It is assigned as error that the court admitted testimony relating to the conduct of the appellant and his alleged paramour three months prior to the date alleged in the information. In this class of cases such testimony is always competent. Underhill, Crim. Evid., p. 444; *State v. Wood*, 33 Wash. 290, 74 Pac. 380.

(8) It is assigned as error that the court admitted evidence of the marriage of Paulina Smith, and that such evidence was incompetent and immaterial. The competency of this testimony we will consider hereafter. If immaterial, it is not prejudicial. Furthermore, the state had the right to prove all the surrounding circumstances, including the

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fact that Paulina Smith was married and that her husband was absent in Alaska.

(9) It is assigned as error that the state was permitted to cross-examine its own witness, that the state's witnesses were allowed to repeat their testimony and that the court admitted evidence of conversations held in the absence of the appellant. The record furnishes no basis for these assignments.

(10) It is assigned as error that the court admitted evidence tending to show that Paulina Smith gave birth to a child early in the year 1904. It appears that the husband of Paulina Smith was continually absent in Alaska from the month of May, 1902, until the month of September, 1903. Notwithstanding the absence of her husband and the good reputation for virtue and chastity which she established at the trial, the fact seems to remain that she gave birth to a child more than twenty months after she had seen or cohabited with her husband. The state could not prove its entire case at once. The fact that Paulina Smith committed adultery with some person was a circumstance the state had a right to prove. If the appellant was not connected therewith, he was not prejudiced thereby. If he was connected therewith, it established adultery on his part at least, and this was an important step toward proving the ultimate fact of living in a state of adultery. *State v. Wood, supra*; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

(11) It is next assigned as error that there was no competent proof of a marriage between the appellant and Julia Nelson, his alleged wife. The testimony offered tended to show that the appellant and said Julia Nelson were married by a minister of the gospel in the territory of Dakota in the year 1883; that in the presence of the minister and of witnesses they promised to take each other as husband and wife, and that the minister then declared them to be such. The testimony further shows that they lived together con-

tinually thereafter as husband and wife and held themselves out as such. Under all the authorities this was competent proof of marriage. Bal. Code, § 7232, cited by appellant, provides for proof of marriage by a recorded certificate of the marriage or a certified copy thereof, but this method is cumulative and does not exclude other methods of proof. 19 Am. & Eng. Ency. Law (2d ed.), 1197; Wharton, Crim. Evid., § 173; Underhill, Crim. Evid., p. 445; *People v. Stokes*, 71 Cal. 263, 12 Pac. 71; *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84; *In re McLaughlin's Estate*, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115. In the last case cited this court says:

"The proof of the performance of a marriage ceremony by an officer authorized to perform it raises a presumption in favor of its legality. *People v. Schoonmaker*, 75 N. W. (Mich.) 439. 'The testimony of a witness present at the marriage, is ordinarily admissible and adequate proof, unless the law requires official evidence.' Wharton, Criminal Evidence (9th ed.), § 173. See, also, *Miles v. United States*, 103 U. S. 304; *Nance v. State*, 17 Tex. App. 389; *State v. Schaunhurst*, 34 Iowa, 547; 3 Rice, Evidence, § 529."

(12) After the commission of the acts of adultery charged in the information, Julia Nelson obtained a divorce from the appellant. The appellant in this court objects to her competency as a witness against him on the ground that there was no competent proof of a divorce. The respondent, on the other hand, contends that she was a competent witness, whether divorced or not, as the crime of living in a state of adultery on the part of the husband is a crime against the wife, and therefore by the express terms of the statute she is rendered competent. Whether the wife is a competent witness against the husband in a prosecution of this kind is an important question upon which the authorities are divided, and we do not find it necessary to decide the ques-

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tion on this appeal. Testimony was offered and received to the effect that Julia Nelson was not the wife of the appellant at the time of the trial, and that they had been divorced. The only objection interposed to this testimony was after the testimony was in and upon the ground that the testimony was "incompetent, irrelevant, and immaterial." This objection was not sufficient to raise the question that a certified copy of the decree of divorce was the best evidence of the fact that a divorce had been granted. 8 Ency. Plead. & Prac., 226; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. 933; *Guarantee Loan & T. Co. v. Galliher*, 12 Wash. 507, 41 Pac. 887; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

An objection of this kind will not be entertained for the first time in this court. Had this particular objection been called to the attention of the trial court, it might readily have been obviated by producing the decree of divorce, which was apparently on file in the same court. Julia Nelson was, therefore, a competent witness against the appellant, except as to communications made by one to the other during marriage, and it is not claimed that any such communications were offered or received. 30 Am. & Eng. Ency. Law (2d ed.), 950; Wharton, Evidence (3d ed.), § 429; Greenleaf, Evidence (16th ed.), § 337; *Inman v. State*, 65 Ark. 508, 47 S. W. 558; *People v. Marble*, 38 Mich. 117; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255.

(13) It is next urged that Barney Smith, the husband of Paulina Smith, the alleged paramour of the appellant, was not a competent witness against the appellant. Paulina Smith was not on trial, or charged with crime, and this objection is not tenable. Underhill, Crim. Evid., p. 234; Wharton, Crim. Evid. (9th ed.), § 396. A witness cannot be said to be examined for or against one who is not a party to the proceeding. *People v. Langtree*, 64 Cal. 256, 30 Pac. 813.

(14) Paulina Smith was offered as a witness by the appellant, and denied that she ever had intercourse, or lived in a state of adultery, with him. For the purpose of impeachment, the state offered in evidence a letter written by the witness to her husband in Alaska, which it was claimed contained certain admissions inconsistent with her testimony at the trial. This was objected to, on the ground, among others, that it was a communication between husband and wife and therefore incompetent. This letter was produced and offered in evidence by the officers of the state, and had therefore lost its character as a privileged communication. Underhill, Crim. Evid., p. 234; Wharton, Crim. Evid. (9th ed.), 398; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. 572, 23 L. R. A. 830.

Appellant contends that the letter was not competent evidence as against him, but it was not offered for that purpose. It was offered for the purpose of contradicting his main witness on the question of the relations existing between her and the appellant, and her testimony as to such relations was certainly material. In view of the statements attributed to both the appellant and her alleged paramour by a number of the witnesses, we think the letter, though somewhat enigmatical, was competent to go before the jury.

We have examined the instructions given and the requests refused, and are satisfied that the law was fairly and correctly given to the jury, and that the substance of the appellant's requests, so far as proper or material, was embodied in the charge of the court. Owing to the length of this opinion, we must decline to review the testimony on this appeal further than to say that we have carefully considered it, as well as all the errors assigned; and, after such consideration, we feel satisfied that every right of the accused

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Statement of Case.

was carefully safeguarded by the court below, and that the verdict is fully sustained by the evidence.

The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

ROOT, J., concurs in the result.

(No. 5540. Decided July 12, 1905.)

THOMAS CARSTENS *et al.*, *Respondents*, v. ALASKA
STEAMSHIP COMPANY, *Appellant*.¹

APPEAL AND ERROR—REVIEW—FINDINGS NOT EXCEPTED TO. Where the findings in an action at law tried without a jury are not excepted to, the evidence will not be reviewed on appeal.

SAME—STATEMENT OF FACTS—AFFIDAVITS ON MOTION FOR NEW TRIAL. The denial of a new trial will not be disturbed on appeal when the affidavit in support of the motion is not brought up in a statement of facts.

CARRIERS—LOSS OF GOODS—JETTISON—ACTION BY CONSIGNOR. In an action by a consignor for the loss of goods jettisoned at sea, findings to the effect that the plaintiff was the consignor of the goods, stating their value, that defendant received the goods as a carrier, agreeing to deliver them to the consignees, and that defendant threw the goods overboard into the sea to the plaintiff's damage in a specified sum, are sufficient to sustain conclusions of law and a judgment establishing defendant's liability for the loss.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 20, 1904, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action for the loss of goods jettisoned. Affirmed.

The findings of fact establish the consignment by the plaintiffs, and the acceptance by the defendant, of the goods, and their value, and include the following:

“(7) That near Midway Island on Stephen's Pass on the trip to Alaska, while the defendant had the said meats

¹Reported in 81 Pac. 691.

and property of plaintiffs on board said steamship, the defendant then and there threw said meat overboard into the waters of Stephen's Pass, and then and there left said meat in the waters of said Stephen's Pass."

Ira Bronson and D. B. Trefethen, for appellant, contended, among other things, that a justifiable jettison relieves the carrier from liability for the loss of goods. *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; *Gillett v. Ellis*, 11 Ill. 579; *Van Syckel v. Ewing*, Fed. Cas. No. 16,877; *Lawrence v. Minturn*, 58 U. S. 100, 15 L. Ed. 58; *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645; *Higgins v. Watson*, Fed. Cas. No. 6,470; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Hunt v. Morris*, 6 Martin (La.) 676, 12 Am. Dec. 489. The fact of a loss from a storm at sea casts the burden upon the plaintiff to prove negligence as the proximate cause of loss, and this was not done. 5 Am. & Eng. Ency. Law (2d ed.), 357; *Jones v. Minneapolis etc. R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. 507; *The Warren Adams*, 74 Fed. 413; 1 Am. & Eng. Ency. Law (2d ed.), 597; *National Bureau etc. Mfg. Co. v. The New Orleans*, 26 Fed. 44; *Gunnell v. Bird*, 77 U. S. 304, 19 L. Ed. 913; 5 Am. & Eng. Ency. Law (2d ed.), 366; *Lords Bailiff v. Trinity House*, 39 L. J. Ex. 163. Giving the findings full effect, a consignor is not entitled to recover for loss of the goods without proof of ownership, or damage to himself, or that he is trustee for the consignees. *McLachlan v. Branch*, 39 Minn. 101, 38 N. W. 703; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Green v. Clarke*, 12 N. Y. 343; *Chamberlain v. West*, 37 Minn. 54, 33 N. W. 114; *Congar v. Galena etc. R. Co.*, 17 Wis. 492; *Union Feed Co. v. Pacific Clipper Line*, 31 Wash. 28, 71 Pac. 552; *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342. Prima facie, the consignee is the one to sue. *Blum v. The Caddo*, Fed. Cas. No. 1,573; *Browne, Carriers*, § 596; *Hutchinson, Carriers*, § 727; *Madison etc. R. Co. v. Whitesel*, 11 Ind. 55; *Pennsylvania*

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Co. v. Holderman, 69 Ind. 18. This presumption prevails until the contrary is shown. *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253.

John E. Humphries and *Harrison Bostwick*, for respondents, contended, among other things, that under the common law the carrier is liable for goods stowed on deck and necessarily jettisoned. *Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *The Wellington*, Fed. Cas. No. 17,384; *Creery v. Holly*, 14 Wend. 26. The burden is upon the carrier to show the necessity for the jettison from expected peril. *The Maggie Hammond*, 9 Wall. 435, 19 L. Ed. 772; *Propeller Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41; *Nelson v. Woodruff*, 1 Black (U. S.) 156; *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 130; *Rich v. Lambert*, 12 How. 347, 13 L. Ed. 1017; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872. And that the vessel was seaworthy. *The C. W. Elphicke*, 117 Fed. 279; *The Manitou*, 116 Fed. 60; *The Frey*, 106 Fed. 319. The carrier's negligence is presumed from the fact of loss. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612. Under the authorities the fact that the goods were thrown overboard, makes a conclusive case. *The Patria*, 132 Fed. 971.

PER CURIAM.—The defendant is engaged in the operation of a line of steamboats, between the city of Seattle and Skagway, and other points in the district of Alaska. On the 6th day of March, 1899, the plaintiffs shipped certain quantities of meat from the city of Seattle, by the steamer "Dirigo," operated by the defendant, a part of which was consigned to Frye-Bruhn & Co., at Skagway, and the remainder to one Birkmeir, at Haines Mission. The meats were thrown overboard and abandoned, in the waters of Stephens pass, and this action was brought to recover dam-

ages for failure to deliver. The case was tried in the court below without a jury, and from the findings and judgment in favor of the plaintiffs, this appeal is prosecuted.

In support of its appeal, the appellant claims, (1) that the steamer by which the goods were shipped became stranded on Midway island, in Stephens pass, and the meats in controversy were thrown overboard from necessity to save the ship; (2) that the respondents, as consignors, showed no right to maintain this action; (3) that the court allowed a recovery for the market value of the goods at the city of Seattle, instead of at the point of destination; and (4) that the court erred in denying the motion for a new trial. The respondents contend that the first three assignments are not open to review in this court, for the reason that there are no exceptions to the findings of fact. This contention is well founded, and we can only consider the sufficiency of the findings to sustain the judgment. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440, and many subsequent cases in this court.

The affidavit in support of the motion for a new trial is not embodied in a statement of facts or bill of exceptions, and is not therefore properly before us. In any event, the affidavit, which appears in the transcript, fails to show that the evidence was newly discovered, or of such a character, as to warrant the granting of a new trial. Inasmuch as the findings of fact sustain the judgment of the court, the judgment must be affirmed, and it is so ordered.

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(No. 5603. Decided July 19, 1905.)

THE STATE OF WASHINGTON, *on the Relation of T. W.
Hammond, Respondent, v. E. W. Ross, as Commis-
sioner of Public Lands, Appellant.*¹

PUBLIC LANDS—OYSTER RESERVES—STATE OYSTER COMMISSION—COUNTY BOARDS—POWERS—STATUTE—CONSTRUCTION—IMPLIED REPEAL OF PROVISIONS RELATING TO COUNTY BOARDS OF OYSTER COMMISSIONERS. LAWS 1903, p. 340, creating a state oyster commission, prescribing duties practically the same as those of the county boards of oyster commissioners under Laws 1897, p. 299, and providing different fees and penalties for the same acts and violations, was clearly intended to give the whole control of oyster reserves to the state commission to the exclusion of the county boards, and impliedly entirely repeals the earlier law relating to the powers of county boards, which therefore have no further authority.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered January 4, 1905, granting a writ of mandate as prayed for, upon overruling a demurrer to the petition. Affirmed.

*The Attorney General, and A. J. Falknor and E. C. Macdonald, Assistants (Welsh Bros., of counsel), for appellant.
B. F. Heuston, for respondent.*

MOUNT, C. J.—This appeal is from a judgment of the lower court, commanding the commissioner of public lands to act upon an application of relator to purchase certain tide lands without reference of said application to the county board of oyster land commissioners of Pacific county. The only question in the case is whether or not the act of March 11, 1897, entitled "An act to secure to the public the continued use of natural oyster beds," is superseded and repealed by implication by the act of March 16, 1903, entitled:

"An act to create a state oyster commission, to define its duties and powers, to provide for the protection and man-

¹Reported in 81 Pac. 725.

agement of the state oyster land reserves, to create a fund to be known as the Oyster Fund, providing for the issue of license to take oysters from the state oyster land reserves, providing for a penalty for violation of the provisions of this act, making an appropriation and declaring an emergency." Laws 1903, p. 340.

The act of 1897, which is found on page 298 of the Laws of 1897, provides for the appointment by the governor of county boards, consisting of three persons, to be known as the "board of oyster land commissioners." The second section of the act is as follows:

"In case of application to purchase oyster lands, the state commissioner of public lands shall, at the time of publication of notice of application to purchase, require the county board of oyster land commissioners to immediately inspect the land applied for and report to the commissioner of public lands their findings as to the following facts: First: Whether the land or any portion thereof is a natural oyster bed. Second: Whether it be necessary in order to secure adequate protection to any natural oyster bed, to retain in the public domain the land the application for the purchase of which has been made, or any portion thereof. Third: Whether the land or any portion thereof, having been a natural oyster bed within ten years past, may reasonably be expected to again become such within ten years in the future."

The act then provides for the procedure in case any of the questions are answered in the affirmative. Section 6 provides for the survey and platting of natural oyster beds, and lands adjacent thereto sufficient for their protection. Section 7 provides that the commissioner of public lands shall declare such lands natural oyster bed reserves, and reserved from sale, lease, or conveyance. The balance of the act defines natural oyster beds, and the powers and duties of the board of oyster land commissioners in reference to caring for, protecting, and replenishing the same, and for the prosecution of offenders under the act.

The act of 1903, which is found in the laws of that year

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beginning on page 340, provides for the creation of a state oyster commission, to consist of the governor, the commissioner of public lands, and the fish commissioner. Sections 2, 3, and 4 provide for the keeping of records of all meetings of the board, and the times and place of meeting, and the number which shall constitute a quorum to render a decision. Sections 5 and 6 provide as follows:

"Sec. 5. It shall be the duty of the state oyster commission, and they shall have power to:

"(1) Examine all existing oyster reserves and to do or cause to be done such things as may be deemed advisable, to conserve, protect and develop said reserves as now established and that may be hereafter established, and to make such rules and regulations as may be found necessary or desirable to carry into effect the provisions of this act.

"(2) To immediately examine all tide or oyster lands belonging to the state (except tide lands of the first class and lands hereinabove provided for) and to survey, plat and establish thereon what shall be and constitute oyster reserves for the future.

"(3) To cause a survey or resurvey of all the state oyster land reserves now existing or to be established by the said commission, to be made before the first day of October, 1903, or as soon thereafter as possible, and shall have each angle of the boundary line indicated by a stone of not less than one hundred pounds in weight and marked with the letters S. R. cut thereon in letters not less than three inches long and one-half inch deep, and to cause all oyster reserves to be platted, said plats to be filed in the office of the commissioner of public lands and in the office of the auditor of the county wherein said reserves are located; and in cases where the adjoining lands are used in whole or in part by private individuals for the production of oysters, stakes shall be kept standing on all of the angles of the boundary, the tops of which shall be at least four feet above high tide.

"(4) Said commission may, when it seems to them advisable, close any portion of any of the reserves against the removal of oysters for any period of time, not longer than two years at one time: *Provided*, That such closed periods may be thereafter renewed, from time to time, not exceeding in all four years, by the commission.

"(5) To care for and protect all reserves and to reseed and replant such as are in need of seed.

"(6) To employ such patrolmen and deputies as may be necessary for the protection of oyster reserves and collect licenses and payment for seed oysters and to define their duties.

"Sec. 6. The tide land within all oyster reserves established and surveyed and platted by said state oyster commission shall be forever reserved from sale or lease."

Section 7 provides for a license to take said oysters, and sections 8, 9, 10, and 11 provide for the time for taking seed, and what the application therefor shall contain, the provisions of the license, and the fee therefor, which is a different fee from the one provided for in the act of 1897. Section 12 provides for an oyster fund, and section 13 provides for a penalty for a violation of the act by any person. This is a different penalty from the one provided in the act of 1897. Section 14 makes an appropriation for carrying the act into effect.

There is no repealing clause to the later act, nor is there any reference therein to any other act, or to any subordinate body having charge of any of the oyster lands belonging to the state. This later act gives the whole of the state oyster lands into the hands of the state oyster commission with plenary power to,

" . . . examine all existing oyster reserves and to do or cause to be done such things as may be deemed advisable to conserve, protect, and develop said reserves as now established, and that may be hereafter established, and to make such rules and regulations as may be found necessary or desirable to carry into effect the provisions of this act,"

and to establish on all tide lands, except tide lands of the first class, oyster reserves for the future. The duties of the state oyster commission, in reference to caring for and protecting the oysters and seed, are practically the same as those of the county board of oyster land commissioners under the old act. The fee for licenses to take seed is different,

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and the price of seed gathered is different, under the new act, and the penalty for a violation of the same provision in the two acts is different.

It is apparent from a reading of the two acts that they cannot stand together in regard to protection, management, and control of the oyster reserves. The legislature of 1903 clearly intended to give the whole control of these reserves into the hands of the state oyster commission, to the exclusion of the county board of oyster land commissioners, under the act of 1897.

But it is argued by appellant that there is no provision in the act of 1903 covering the provisions contained in § 2 of the act of 1897, above quoted, relating to the sale of tide or oyster lands. It is true that there is no express provision of that kind in the act of 1903. The provisions in § 2 of the act of 1897 were clearly for the purpose of preventing the sale of tide lands which were natural oyster beds and which were necessary for the protection of such beds, or which might reasonably be expected to become such beds, where applications were filed to purchase tide lands from the commissioner of public lands under other laws providing for the conditional sale of certain tide lands fit for oyster culture. Some such provision as that contained in § 2 of the act of 1897 was necessary to give the oyster commissioners control of the natural oyster beds. The sale of tide lands was vested in the commissioner of public lands, and not in the board of oyster land commissioners. Applications were referred to that board, so that natural oyster beds which had not been declared such might not be sold. The provisions were necessary for the purpose of control and preservation of the oyster beds by the board of oyster land commissioners, and were for no other purpose. These provisions were not independent provisions, capable of enforcement when the substantial law failed. The power of control being now vested in the state oyster commission by the later act, the provisions of the earlier act relating to the

powers of the old board must necessarily fail. Furthermore, while the act of 1903 is more general, we think that the provision of § 5, which reads that the state oyster commission shall have power,

“ . . . to do or cause to be done such things as may be deemed advisable to conserve, protect, and develop said reserves as now established and that may be hereafter established, and to make such rules and regulations as may be found necessary or desirable to carry into effect the provisions of this act,”

includes the power to pass upon the questions contained in § 2 of the act of 1897, and other questions of that character going to the protection of natural oyster beds. We are of the opinion, therefore, that all the provisions of the act of 1897 above referred to are covered by the subsequent act of 1903, and that the former act is entirely repealed by the enactment of the later law. The county board of oyster land commissioners, therefore, have no further authority under the law.

The judgment appealed from is affirmed.

CROW, ROOT, FULLERTON, RUDKIN, HADLEY, and DUNBAR, JJ., concur.

(No. 4882. Decided July 19, 1905.)

B. P. ENO, *Respondent*, v. T. P. SANDERS, *Appellant*.¹

APPEAL—REVIEW—FINDINGS—WEIGHT OF—EVIDENCE. Findings of the trial court in an equity case will not be disturbed on appeal where the supreme court is unable to say that the weight of the evidence is against the conclusion reached below.

ESTOPPEL—LACHES—DELAY IN BRINGING SUIT—INCREASE OF VALUES. Mere delay, short of the statute of limitations, will not bar an action in equity to recover an interest in a mining claim that meanwhile had greatly increased in value, when the fact of plaintiff's claims was at all times known, and there was no deceit or

¹Reported in 81 Pac. 696.

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bad faith, and the increase in value was not due to development at the cost and risk of the defendant, but plaintiff was engaged in the development and was in a position to lose as much as the defendant in case of failure.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered June 1, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover an interest in a mine. Affirmed.

Shank & Smith, for appellant.

J. N. Phillips and *Dorr & Hadley*, for respondent.

FULLERTON, J.—In the summer months of the year 1900, one T. F. Jeffrey and three others discovered some five mining claims, in the Mount Baker mining district, and located the same under the mining laws of the United States. The claims as located were contiguous to each other and constituted a group, and are known in the record as the Excelsior group. Jeffrey also owned, at that time, an undivided two-sevenths interest in another group of claims, called the Bonanza group. On October 25, 1900, Jeffrey sold to the appellant, Sanders, one-fifth of his interest in the Excelsior group, and two-sevenths of his interest in the Bonanza group, giving him at that time a memorandum in writing, of which the following is a copy:

“Seattle, Wash., Oct. 25th, 1900.

“Received from T. P. Sanders per A. D. Cameron the sum of one hundred dollars in full for ball of amount on two-sevenths (2-7) interest on the Bonanza Group also one-fifth Int. in the Excelsior Group situated in Whatcom Co. state of Washington. T. F. Jeffrey.”

On March 9, 1901, the appellant sold to the respondent, Eno, all the interest in both groups of claims that he had acquired from Jeffrey, executing and delivering to him a bill of sale in the following language:

“For and in consideration of the sum of Two Hundred and fifty (250) dollars, I hereby sell, transfer, assign, and

warrant to B. P. Eno a 2-7 interest of T. F. Jeffrey interest in the Bonanza Group, consisting of nine (9) claims, and a one fifth interest of T. F. Jeffrey interest in the Excelsior Group consisting of five (5) claims, situated in Whatcom County and State of Washington; being the same interest assigned to me by T. F. Jeffrey, the original of which is hereto attached, and said instrument being dated Seattle, Wash., October 25, 1900, and recorded January 28, 1901, at 8:50 A. M. in Vol. 5 of M. C., page 523 in the records of Whatcom County, State of Washington.

"These claims are located in Whatcom county, state of Washington, and are known as the Bonanza group of nine claims; & the Excelsior Group of five claims, all of which are on Record in said County and State. The title to which I hereby warrant and defend to the interests of the said B. P. Eno as set forth in said instrument hereto attached.

"In Witness Whereof I have hereunto set my hand this 9th day of March, 1901. T. P. Sanders."

While the matter remained in this condition the owners of the several claims decided to form corporations to take title to and work the same; and to that end incorporated the Great Excelsior Mining Company, and transferred to it the group of claims known as the Excelsior group, and also incorporated the Hoosier Mining Company, and transferred to it the Bonanza group of claims. The stock of the respective corporations was treated as fully paid up by the transfers so made, and, after deducting a certain amount to be sold as treasury stock, the remainder was directed to be distributed to the owners of the several interests in the claims in the proportion that such several interests bore to the amount distributed. The distributive shares belonging to the appellant and respondent were issued in the name of, and delivered to, the appellant, who turned over to the respondent such part thereof as he contended the respondent was entitled to by reason of the bill of sale before referred to. The respondent conceived that he had not received his just proportion, and brought this action to

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compel the appellant to deliver to him the balance claimed by him. After a trial of the issues between the parties, the court found that the appellant had given him such proportion of the stock in the Hoosier Mining Company as his interest represented, but that he was the owner of a one-fifth of one-fourth in the Excelsior group, and entitled to 50,000 shares of the capital stock of the Great Excelsior Mining Company, and that the appellant had turned over to him only 25,000 shares thereof. A decree was entered directing that the remainder be delivered. This appeal is from that decree.

The appellant, in this court, makes two principal contentions. He contends, first, that it was understood between the appellant and respondent, at the time the bill of sale was executed, that a one-fortieth interest instead of a one-twentieth interest in the Excelsior group of mining claims was conveyed thereby, and that the parties by their subsequent conduct construed the transfer in that way; and, second, that, inasmuch as the respondent did not bring this action until some two years after the sale was made, he is guilty of laches, and ought not now to be permitted to recover.

The first question is not entirely free from difficulty. The bill of sale from the appellant to the respondent describes the interest conveyed in the claims here in question, the Excelsior group, as a one-fifth interest of the Jeffrey interest, which, it goes on to recite, is the same interest the appellant acquired from T. F. Jeffrey. Turning to the location notices, which were offered in evidence, it is found that each of them is signed by four persons as locators, of which Jeffrey was one. The legal presumption would therefore be that he was the owner of a one-fourth interest in the group, and the conclusion reached by the trial court would seem to be justified. But the appellant contends that Jeffrey's interest in the claims, instead of being a fourth, was an eighth, for the reason that he had furnished Jeffrey with

a grub-stake, under an agreement that he was to have a one-half interest in any such property as Jeffrey should acquire during the prospecting trip in which the claims were discovered and located. He further shows that the parties entered into a written agreement at the time it was agreed to form corporations, in which the interest of the respondent in the Excelsior group was described as a one-fortieth interest.

Jeffrey, however, denies that he was prospecting on a grub-stake at the time the claims were located, and insists that he owned a quarter, instead of an eighth, interest in them at the time he made the sale to the appellant. Other circumstances shown in the record, it seems to us, support this contention, and we think the weight of the evidence is with it. In explanation of his act in signing the incorporation agreement mentioned, the respondent testified that, when the agreement was first presented to him at the mines, he refused to sign it, because it did not correctly represent his interests, and that later on the appellant came from Seattle to the mines for the purpose of procuring his signature, when a conversation was had between them which he relates in the following words:

"He asked me why I didn't sign these papers, when he sent them up by Mr. Cameron. I told him, because they didn't set forth my interest, and he says, 'why, you are retarding the Company, you are holding it back by not signing these papers,' and he said, 'it won't make any difference, there is simply an agreement to incorporate, it won't make any difference with your interest.' I said, 'I don't like to sign anything that I don't understand and I refuse to sign away my rights in any way.' He says, 'You located the Lizzie B and the water right.' I said, 'Yes.' 'Well,' said he, 'I will give you 6,250 shares of stock more for your interest in the Lizzie B and the water right, if you will sign these papers.' I said, 'Very well, I will sign these papers, but I don't want to sign away my rights.' That was the condition under which my signature was placed here."

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This agreement, it will be remembered, was not, and did not purport to be, a conveyance of any interest in the mines from the respondent to the appellant, nor does the appellant now claim it to be such. He simply introduced it in evidence as tending to show an admission on the part of the respondent to the effect that his interest in the claims was a one-fortieth, instead of a one-twentieth, as he was then claiming. But as the amount of this interest had all along been a matter of dispute between the parties, and as the respondent orally stated to the appellant at the time he signed it that it did not correctly represent his interest, it can scarcely be entitled to weight as an admission. Other circumstances and conversations are shown by each of the parties, tending to support their respective contentions, which we shall not attempt to review. On the whole, we are unable to say that the weight of the evidence is against the conclusion reached by the court on this question, and, under the rule we have uniformly followed in such cases, we will not disturb the court's findings.

The second contention of the appellant is based on the fact that the claims, between the time the respondent acquired his interest and the time he began his action, had developed from a mere prospect, having a speculative value only, to a mine having a market value of something like a quarter of a million dollars; and it is argued that it is unconscionable and inequitable, in view of this fact, to allow the respondent to assert claims that he probably would not have asserted had the property not increased in value.

Doubtless if the respondent had stood by and allowed the appellant to develop the property at his own cost and risk, in the belief that his interests were what he claimed them to be, equity would not have allowed the respondent to assert his claim, after so long a delay and after the property had so changed in value, but such are not the facts as shown by this record. The respondent engaged with the appellant in the development of the mine. He was in a position to

lose, in case the venture should prove a failure, as much, if not more proportionally, than was the appellant. The appellant knew at all times what the respondent's contentions respecting his interests were, and could have had them determined by suit at any time he so desired. There was no deceit, bad faith, or even wrongful motives shown on the part of the respondent, and under such circumstances his right of action would not bar short of the statute of limitations, and there is no contention that the statute of limitations has run against his right of action.

As we find no error in the record, the judgment appealed from will stand affirmed.

MOUNT, C. J., RUDKIN, CROW, and DUNBAR, JJ., concur.

(No. 5663. Decided July 20, 1905.)

NOVELTY MILL COMPANY, *Appellant*, v. L. A. HEINZERLING
and THE AMERICAN BONDING COMPANY OF
BALTIMORE, *Respondents*.¹

CONTRACTS—BREACH—DEFECT IN BUILDING—SPECIFICATIONS AT FAULT. In an action for the breach of a building contract, it is immaterial that the contractor drew up a clause in the specifications requiring tamping of concrete piers, which it is claimed by him caused the defects in the building, where the terms of the contract were not ambiguous, and there is no claim of fraud or overreaching.

SAME—DEFECTS DUE TO PLAINTIFF'S SUPERINTENDENT—PRINCIPAL AND AGENT—PROOF OF AUTHORITY—DECLARATIONS OF AGENT. In an action against a contractor for defects in a building constituting a breach of the contract, in which the defendant claims that the defects were caused by plaintiff's expert superintendent who daily directed the work, testimony of the superintendent concerning his orders and directions about the work, tending to establish his authority, is admissible in connection with proof that the secretary of the plaintiff was often present and heard the directions without denying his authority; and the question of his agency was for the jury.

¹Reported in 81 Pac. 742.

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Citations of Counsel.

CONTRACTS—BREACH—DEFECTS CREATED BY COMPLIANCE WITH CONTRACT—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for damages for the breach of a building contract, evidence tending to show that the defect in the building was caused by tamping concrete piers in the manner required by the contract, and insisted upon by the plaintiff, and that defendant substantially complied with the contract, raises a question for the jury, precluding the direction of a verdict for plaintiff.

SAME—INSTRUCTIONS. In such a case the contractor would not be liable for damages caused by tamping the concrete in the manner required by the contract, although it was faulty workmanship to tamp it, unless the jury find that he failed to do the tamping as it should have been done.

INDEMNITY—ACTION ON BOND—NOTICE OF DEFECT AND LIMITATION OF ACTION. In an action upon an indemnity bond guaranteeing a building contract, it is necessary for the plaintiff, if it has knowledge of the defect, to give notice and bring suit within the time limited in the bond.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 26, 1904, upon the verdict of a jury rendered in favor of the defendants, in an action for damages for the breach of a building contract. Affirmed.

Andrew J. Balliet and *James Kiefer*, for appellant, contended, among other things, that a contractor, erecting a structure according to plans and specifications, is liable for failure to do the work in a workmanlike manner. *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *Clark v. Pope*, 70 Ill. 128; *Trustees of Monroe Female University v. Broadfield*, 30 Ga. 1; *School Trustees v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *Smith v. Clark*, 58 Mo. 145.

Ballinger, Ronald & Battle, and *F. E. Brightman*, for respondent Heinzerling. The contractor was not liable if the defect was due to tamping required by the contract. *Beswick v. Platt*, 140 Pa. St. 28, 21 Atl. 306.

Charles S. Hills and *Allan C. MacDonald*, for respondent American Bonding Company.

HADLEY, J.—This is an action upon a contractor's bond. The amended complaint avers that the defendant Heinzerling entered into a written contract to construct for the plaintiff a warehouse, in accordance with plans and specifications attached to the contract. The specifications provided that the building should rest upon forty-five concrete piers, and the latter were also to be constructed by said defendant. It was provided that, in constructing each pier, four piles should be driven to a good foundation, and cut off from one to three feet above ground, the earth to be excavated around the piling one foot below the surface, and a casing built around the same made of two-inch lumber, the casing having a dimension of five feet by five feet at the base and three feet by three feet at the top, inside. It was also required that the casing should be filled with concrete made with five parts sand and gravel and one part good Portland cement, said concrete to be well tamped.

The plaintiff alleges that the contractor did not build the piers in accordance with the specifications, in that he failed to use a sufficient quantity of cement, and that he did not use a good quality of Portland cement; that he failed to properly tamp and place the concrete; that he threw the concrete, when mixed, into deep water so that the cement became separated from the sand and gravel; that, in consequence of such defaults on the part of the contractor, the piers are now falling down, and the warehouse is falling by reason thereof, and has become unsafe and useless. It is alleged that the contractor is financially unable to rebuild said piers and make said building such as is contemplated by the contract; that he has refused to do so; and that plaintiff will be obliged to reconstruct the same at an expense of \$2,500, for which amount judgment is demanded. A supplemental complaint filed since the commencement of the action alleges that the piers have been rebuilt, and demands \$1,500 damages in addition to the demand in the principal complaint.

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The defendants answered separately, and each denied that there was any failure to construct the piers in accordance with the contract and specifications. They also each affirmatively averred that, during the whole period of the construction, the workmanship and the material therein were under the direction, supervision, and approval of the officer or agent of the plaintiff, placed in charge of the work by the latter; that at said time the plaintiff informed the contractor that said agent was an expert as to work of that character; that, after the completion of the contract, the plaintiff withheld payment for ten days until the work was further wholly inspected and approved by other competent experts, selected by the plaintiff; that, having selected such experts, the plaintiff caused the work to be thoroughly examined by them, and they found that the entire work was done strictly in accordance with the plans and specifications, and that thereupon the plaintiff accepted the work. Other affirmative defenses interposed by the surety company we believe it is unnecessary to set out here. The cause was tried before a jury, and a verdict was returned for the defendants. Plaintiff moved for a new trial, and the same was denied. Thereupon judgment was entered for the defendants, and the plaintiff has appealed.

Appellant's counsel asked a witness who it was who drew the specifications for the piers. The respondents objected, and the court sustained the objection. This is assigned as error. It was claimed by the respondents that the tamping of the concrete under water had caused the defect in the piers, and expert witnesses testified to that effect. It was also claimed that the contractor was required by the contract to tamp it, inasmuch as the specifications contained the following: "Said concrete to be well tamped." Appellant desired to show that the specifications were drawn by the contractor himself, but we are unable to see that such fact became material inasmuch as no fraud or overreaching was charged by appellant. The terms of the con-

tract were plain and unambiguous. It is not claimed that appellant did not have ample opportunity to read and understand it before signing, and it is therefore immaterial who drew it.

Error is urged upon the court's rulings in not sustaining objections to the testimony concerning the orders and directions about the work, given by the miller Robertson. It was testified that Robertson was about the work daily, that he gave many directions concerning the work, and frequently ordered further tamping of the concrete after the contractor had ceased to tamp it. It is urged that this testimony was objectionable, for the reason that the agency of Robertson for appellant could not be established by his own acts and declarations. Standing alone, they were doubtless insufficient, but it appeared that he was often about the work in company with the secretary of appellant corporation, the officer who had executed the contract for the appellant, that this officer frequently heard Robertson giving the directions concerning tamping and other things, and that he at no time intimated to the contractor that Robertson was not authorized to so direct. Under such circumstances, the question as to Robertson's authority and agency was for the jury, and the objections were properly overruled.

A number of assignments of error relate to instructions given, and to the refusal to give others requested by appellant. It is urged that it was error to refuse to instruct the jury to return a verdict for appellant in the full sum demanded. We think such an instruction would have been erroneous, in view of the evidence. There was evidence to the effect that the piers were weakened by too much knocking and jarring, which ruptured the crystals of the cement while they were becoming set in the salt water; that the concrete was jarred by the tamping; that the contract called for the tamping; and that appellant not only observed the tamping and approved thereof, but insisted upon even more of it than the contractor was disposed to give; that appellant

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itself placed a heavy weight upon the floor over the piers before the cement was sufficiently set, and that this also had the effect of jarring and weakening the piers. There was sufficient evidence of a substantial compliance with the terms of the contract to leave the jury to say whether the piers were weakened by reason of any default or neglect on the contractor's part.

Appellant further insists that it was error to refuse to give the following instruction:

"Under the contract and specifications, it was the duty of Heinzerling to know how to tamp the concrete in boxes for the piers, and if the jury finds that it was faulty workmanship to tamp the concrete in the water, and that it was so tamped, and that such tamping caused the defects in the piers, it was the negligence and unskillfulness of Heinzerling which caused the defects in the piers, and plaintiff is entitled to recover."

In view of the terms of the contract, which required tamping, we think the instruction asked was erroneous.

The following instruction was given:

"Now, with regard to the charge of improper tamping: As I have said, if the contractor did what he was required to do by the contract, he would not be liable for any damage because of a fault in the contract itself, and if he was required by the contract to tamp this concrete, and if the fall of the wharf was occasioned by the tamping of the concrete, the plaintiff could not recover, because under the contract he was required to tamp the concrete; but it is for you to say, under the evidence, whether in tamping the concrete he did it in the way that it should have been done, whether there was any defect in the tamping of this concrete, and if you should find from the evidence that he did not tamp the concrete as it should have been done, or did not put it in place as it should have been put there, or did not mix it in the proper proportions, or did not use a sufficient quantity, and if you should find that on any of these accounts or for any of these reasons, the wharf fell, and the plaintiff was put to the expense of reconstructing it, then you would find for the plaintiff to the extent of \$4,000, if

you should be satisfied that the plaintiff incurred that expense in that way."

We think the above instruction comprehensively and correctly covered the subject of tamping, under the issues and evidence.

The complaint made under the fourth and fifth assignments of error we shall not discuss, inasmuch as we think the court, in general effect, gave instructions covering the same points contained in the appellant's requests; and we think the same is true of the sixth, fifteenth, and seventeenth assignments, to the extent, at least, that no prejudicial error is involved therein.

Error is urged upon the refusal to give the following instruction:

"Any knowledge or information which the witness Robertson, the miller and employee of the plaintiff company, may have gained as to the methods employed by the defendant Heinzerling in the construction of the forty-five concrete piers in question was not the knowledge of the plaintiff company, and cannot in any manner bind or control the plaintiff corporation, and the jury are instructed to disregard and not consider any such knowledge or information of said witness Robertson."

We have already said that the question of Robertson's agency was, under the evidence, for the jury. The above requested instruction would have taken that question from the jury, and it was therefore properly refused.

We think the instruction criticized under the eighth assignment of error was not erroneous. It stated, in effect, that the fact that the miller of appellant company was around the work and saw how it was being done, and the fact that he may have undertaken to direct how it should be done, would not charge the mill company with notice, unless the miller was authorized by the company to look after the work, and was held out as its agent for that purpose, which latter fact the jury were to determine from the evidence.

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We find no error in the instruction concerning notice to the bonding company as to a breach of the contract. It was one of the defenses interposed by the bonding company that, if there was any defect in the work, the mill company had knowledge of it long before it notified the bonding company thereof. The bond required that immediate notice should be given, and that suit should be brought within six months after the first breach. The instruction made it clear that, if the jury should find from the evidence that the mill company had knowledge of the defect, then it was its duty to at once notify the bonding company, and bring its suit within six months thereafter. The instruction left the jury to find whether appellant had knowledge of the defect, and failed thereafter to act in accordance with the terms of the bond.

Complaint is made that some of the instructions were misleading and confusing in their terms. We do not find them so, and we believe the instructions, as a whole, fairly covered the law of the case, under the issues and evidence.

We think it was not error to deny the motion for a new trial. The fact was fully submitted to the jury whether the defect in the piers was due to any violation of the terms of the contract on the part of the contractor. The verdict established that it was not caused by a breach of the contract, and we shall not disturb it. The judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, ROOT, RUDKIN, and DUNBAR, JJ., concur.

(No. 5575. Decided July 20, 1905.)

JAMES CUSKER, *Appellant*, v. R. J. BERRYMAN, *Respondent*.¹

ELECTIONS—CONTEST—TIME FOR TAKING—DECLARING RESULT. The time for instituting an election contest, under Bal. Code, §§ 1410, 1430, does not commence to run until the county auditor has certified to the election returns and issued a notice of election.

Appeal from an order of the superior court for Walla Walla county, Brents, J., entered December 16, 1904, dismissing an election contest, upon sustaining defendant's motion to quash the proceedings. Reversed.

T. P. Gose and Francis A. Garrecht, for appellant.

John L. Sharpstein and Lester S. Wilson, for respondent.

RUDKIN, J.—This is an appeal from an order dismissing an election contest for the reason that the same was not instituted within the time limited by law. This branch of the case was heard upon an agreed statement, from which the following facts appear: On the 16th day of November, 1904, after the election returns were received from each and every precinct of Walla Walla county, the chairman of the board of county commissioners, the prosecuting attorney, and the county auditor met and organized as a canvassing board, for the purpose of canvassing the votes cast in the several precincts of the county. On that day the total of the votes cast in each precinct for each candidate was ascertained and determined, and entered in a schedule prepared for that purpose. But the grand total of all votes cast for the different candidates, in all the precincts of the county, was not footed up or ascertained. The canvassing board thereupon directed one J. W. McGhee, a deputy county auditor, to compute the total number of votes cast for each candidate, in all the precincts, on an adding machine, and adjourned. On the 19th day of

¹Reported in 81 Pac. 686.

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November, 1904, McGhee completed the work assigned him, and ascertained the total vote of each candidate in the county, from which it appeared that the appellant received a total of 1,864 votes for the office of county assessor, and the respondent a total of 1,958 votes for the same office.

No further action was taken by the board of canvassers, except that on the 21st day of November, 1904, the prosecuting attorney and the county auditor compared the totals of the votes, as ascertained and entered in said schedule by McGhee, with two other facsimiles of such schedule, and found the same to be accurate. On the same day the county auditor attached his certificate to such schedule and the two facsimiles, to the effect that the same contained a correct copy of the abstract of the votes polled in Walla Walla county at the general election, and thereupon issued to respondent a notice of election, notifying him that he had received the highest number of votes cast for the office of county assessor. No official record was kept of the proceedings of the canvassing board, and no statement of the count or canvass was drawn up or signed by the canvassing board, or any member thereof. The statement of contest was filed on December 1, 1904.

The provisions of the statute bearing upon the question under consideration are the following: Bal. Code, § 1407, provides that, on the 10th day after the election, or as soon as the returns are in from the several precincts, the county auditor shall notify two county officers to be present at his office on a day named, for the purpose of canvassing the votes; that the county auditor shall take the oath therein prescribed, "and then the said auditor, with the assistance of two county officers aforesaid, shall proceed to count the votes of said county or precincts, a statement of which shall be drawn up and signed by them." Section 1408 designates the chairman of the board of county commissioners and the prosecuting attorney as the two officers to be notified, and declares that said officers, together with the county

auditor, shall constitute the county canvassing board of election returns. Section 1410 provides that the person having the highest number of votes given for each office to be filled by the voters of a single county, or of a precinct, shall be declared duly elected, and the county auditor shall immediately notify him of his election, and make out and deliver to him a certificate of election on application therefor. Section 1430 provides that,

“When any such elector shall choose to contest the right of any person declared duly elected to such office, he shall, within ten days after such person shall have been declared duly elected to such office, file with the clerk of the superior court of the county a written statement, setting forth,” etc.

The election statutes are inharmonious. This results principally from the fact that they have been amended from time to time by changing the names of officers, and by adding new officers, without making any corresponding change in other parts of the statutes. For example, section 6 of chapter 7 of the act of January 22, 1866, provides that the county auditor, within ten days after the election, or as soon as the election returns are in,

“Shall proceed to estimate the vote of the county or precinct, a statement of which shall be drawn up and signed by him. The statement shall contain the names of the persons voted for; the office to fill which each person was voted for; the number of votes given at each precinct to each of such persons, and the number of votes given to each in the county; and the same shall be filed, together with the returns from each precinct, in the office of the county auditor.”

Section 7 of chapter 7 of the same act is identical with Bal. Code, § 1410. Section 6 of chapter 8 of the same act is identical with Bal. Code, § 1430, except that under the former the statement of contest was filed with the county auditor instead of the clerk of the superior court. The ten days within which a contest must be instituted commences to run when the contestee is duly declared elected

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to the office, but the statute does not provide for a formal declaration of the result of the election, nor by whom such declaration shall be made. Under the original act of 1866, we have no doubt that the result of the election was formally declared when the county auditor prepared and signed the written statement provided for in § 6 of chap. 7, *supra*, and filed the same, together with the election returns, in his office, thereby making the result of the canvass a matter of public record. We think the same is true under Bal. Code, § 1407. The latter section does not in terms provide that the statement shall be filed in the auditor's office; but, inasmuch as that officer is the custodian of the election returns, it should be so filed. The time allowed by law for the institution of a contest is very short at best, and a contestant is entitled to rely on the record for his guidance. He should not be required to look beyond the record, nor to the progress made by a deputy auditor in footing up the election returns. No formal statement of the canvass was drawn up or signed in this case, but the appellant had a right to presume that the canvassing board would comply with the statute, and this presumption would continue until the canvassing board or the county auditor took some action inconsistent therewith, indicating that the result of the election had been declared and their labors completed. There was nothing of record to show that the result of the election in question had been declared, or that the canvassing board did not intend to comply with the requirements of the statute, until the county auditor certified to the election returns and issued a notice of election to the respondent, on November 21; and the time for instituting a contest did not commence to run until then.

In our opinion, the contest was instituted within time; and the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MOUNT, C. J., ROOT, CROW, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

(No. 5573. Decided July 21, 1905.)

WESLEY DAVIS *et al.*, Respondents, v. WILLIAM VIRGES *et al.*,
Appellants.¹

APPEAL—REMITTITUR—JUDGMENT AGAINST SURETIES—POWER OF LOWER COURT—BONDS. Upon the dismissal of an appeal in the supreme court without the entry of any judgment against the appellant and his sureties, the lower court, after remittitur, has no power to enter judgment against the sureties upon the statutory appeal and supersedeas bond given by the appellant, there being no statutory provision for such summary judgment.

SAME—SUMMARY JUDGMENT BY AGREEMENT—SURPLUSAGE IN BOND. A gratuitous clause in a statutory bond whereby the sureties agree to the entry of summary judgment against them, in case the appellant fails to pay the judgment within thirty days after the filing of the remittitur, is without legal force, and confers no right to such a judgment, the sureties being entitled to their day in court.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 21, 1903, in favor of the plaintiffs and against sureties upon the defendants' appeal bond, after the dismissal by the supreme court of an appeal from a judgment of the same court. Reversed.

Hudson & Holt, for appellants, to the point that a summary judgment cannot be entered unless authorized by statute, cited: *O'Connor v. Lighthizer*, 34 Wash. 152 75 Pac. 643; *Hanna v. Savage*, 8 Wash. 432, 36 Pac. 269; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95; *Blair v. Sanborn*, 82 Tex. 686, 18 S. W. 159; *Offerman etc. R. Co. v. Waycross Air-Line Co.*, 112 Ga. 610, 37 S. E. 871; *Miller v. Hogeboom*, 56 Neb. 434, 76 N. W. 888. A statutory bond does not constitute a voluntary stipulation. *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070. Surplus provisions in a statutory bond cannot be enforced except by common law action. *Brown v. Levins*, 6 Porter (Ala.) 414; *State ex rel. Stow v. City Council of Montgomery*, 74 Ala. 226;

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Jones v. Parsons, 10 Tenn. 320; *Hymens v. Brown's Ex'rix*, 15 Tex. 302; *Presbury v. Fisher*, 10 Mo. 50; 8 Cent. Dig. p. 49; *Powers v. Chabot*, *supra*; *McCallion v. Hibernia Sav. & Loan Soc.*, 98 Cal. 442, 33 Pac. 329; *Central Lumber & Mill Co. v. Center*, 107 Cal. 193, 40 Pac. 334. Summary judgment must be authorized by, and strictly conform to, the state statute. *Halsey v. Murray*, 112 Ala. 185, 20 South. 575; *Offerman etc. R. Co. v. Waycross Air-Line Co.*, *supra*; *Reynolds v. Cox*, 108 Ala. 276, 19 South. 395; *Selby v. McQuillian*, 45 Neb. 512, 63 N. W. 855; *Powell v. Camp*, 60 Mo. 569; *Gunn v. Sinclair*, 52 Mo. 327.

John C. Stallcup, *J. W. A. Nichols*, and *Albert E. Joab*, for respondents.

MOUNT, C. J.—On February 21, 1903, respondents recovered a judgment for \$750 and costs, against the Tacoma Railway & Power Company, George M. Shreeder and Mace C. Green, and thereafter the judgment debtors appealed to this court. Shreeder and Green did not join with the Tacoma Railway & Power Company in the appeal, but took a separate, independent appeal. At the time the appeal was taken by Shreeder and Green, an appeal and supersedeas bond was given by them, with A. Huth and William Virges as sureties. The bond was in substance as required by statute, except after reciting that, if the judgment appealed from should be affirmed on the appeal or dismissed, appellants would pay the amount directed by the judgment on the appeal, it contained the following provision:

"If the appellants do not make such payment within thirty days after the filing of the remittitur from the supreme court, judgment may be entered on motion of the respondents in their favor against the undersigned sureties, for the said sum of \$750, together with \$45.95 costs, together with \$. . . interest that may be due thereon, and the damages and costs which may be awarded against the appellants upon the appeal."

When the case came on to be heard in this court, the appeal of Shreeder and Green was dismissed, for the reason that their notice of appeal was not served on the railway company. The judgment was reversed as to the railway company, and remanded for a new trial. *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209. No judgment was entered by this court in favor of the respondents. Thereafter, when the remittitur from this court went to the lower court, respondents moved the lower court for a judgment against the sureties on the bond, for the amount of the judgment and costs against Shreeder and Green. No notice of this motion was given, except an oral notice. The sureties appeared by their counsel, and objected to the jurisdiction of the lower court to enter judgment in such summary manner against the sureties on the bond. This objection was denied, and judgment was entered as requested. The sureties, Virges and Huth, now appeal from that judgment.

There is no provision of law authorizing the lower court to enter a judgment in this summary way upon a statutory bond given on appeal to this court. The statute, Bal. Code, § 6523, expressly provides that this court, upon the affirmation of a judgment, may render judgment against both the appellant and his sureties in the appeal bond, for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial. But there is no such provision relating to the lower court. In *Grunewald v. West Coast Grocery Co.*, 11 Wash. 478, 39 Pac. 964, it was held that this court could not render a judgment against the sureties on an appeal bond where we had not obtained jurisdiction of the cause. See, also, *Henry v. Great Northern R. Co.*, 16 Wash. 417, 47 Pac. 895. If this court had no jurisdiction to enter a judgment against the sureties upon this appeal bond, it needs no argument to show that the lower court acquired no jurisdiction to do so, where there is no express statutory authority therefor. In speaking to this point under a statute

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which provides for a cost bond in actions brought by non-residents, Bal. Code, § 5186, in *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643, we said:

“That statute makes no provision for the entry of judgment as of course against the sureties, in the same action in which the bond is filed. Without such express statutory authority as entering into, and becoming a part of, the contract in the bond, whereby the sureties consent to such judgment, we believe judgment cannot be entered against them; and they are not, therefore, parties appearing in the action upon whom notice of appeal is required, within the meaning of § 6504, Bal. Code. Not being persons against whom judgment may be entered as of course by statutory authority, they are entitled to their day in court.”

The same reasoning which we applied to that case must be applied in this, because there is no substantial difference in the two cases.

Counsel for respondents argue that, because the bond provides that judgment may be entered against the sureties upon motion, for the amount due from the principal, therefore the lower court had jurisdiction to enter the judgment as of course. It is sufficient answer to this to say that this bond is a statutory bond. The provision under consideration was not required by statute. Its insertion, therefore, was a mere gratuity which added no legal right nor liability. It was surplusage. If this provision may be held to confer a right to enter a judgment, as of course, without an action upon the contract, the same rule would permit a judgment upon any contract when it is stated that judgment may be taken upon default of the terms of the contract. This can never be a just and equitable rule, and is not permitted. The debtor must be given his statutory notice by summons, so that he may have his day in court.

The judgment appealed from is reversed.

ROOT, CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

(No. 5592. Decided July 21, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH
DE PASQUALE, *Appellant*.¹

CRIMINAL LAW — TRIAL — UNLAWFUL COMMENT ON THE FACTS — CROSS-EXAMINATION BY TRIAL JUDGE. It is unlawful comment on the facts, within the meaning of the constitution, for the trial judge in a criminal case to cross-examine the accused, asking leading questions calculated to discredit the witness, and clearly conveying the idea to the jury that, in the opinion of the court, the accused is guilty and his defense not *bona fide*.

Appeal from a judgment for the superior court for Walla Walla county, Brents, J., entered November 1, 1904, upon a trial and conviction of the crime of manslaughter. Reversed.

George T. Thompson and *Oscar Cain*, for appellant.

Lester S. Wilson, for respondent.

MOUNT, C. J.—Appellant was charged with the crime of murder in the first degree, for killing one Dominic Di Valerio. He was tried and found guilty of the crime of manslaughter, and appeals from a judgment entered thereon.

The evidence shows that, at the time of the tragedy, the appellant was employed with a number of other Italians, in paving certain streets in the city of Walla Walla; that the appellant and deceased, Di Valerio, with several other of their countrymen, resided in a small house in said city; that on the 23d day of September, 1904, the appellant and the deceased, while they were in a saloon together, had some words concerning their employment. They called each other vile names, and were prevented from coming to blows by the intervention of friends. Soon after this quarrel, both proceeded to their abode. Appellant reached there ahead of Di Valerio. When Di Valerio came into the house, the quarrel was renewed. After they had quarreled and threat-

¹Reported in 81 Pac. 689.

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ened each other for some time, Di Valerio went out of the house by the front door, and appellant went out by the kitchen or back door. Each was armed with a pistol, and each advanced toward the other from around the outside of the house. When they came within sight of each other, appellant fired at Di Valerio, the ball taking effect and resulting in his death. Appellant thereupon fled, but was apprehended a few days later. Appellant attempted to justify the killing upon the ground of self-defense.

Three errors are assigned upon this appeal: (1) That the court erred in commenting upon the evidence; (2) that the court erred in permitting a witness to testify that the appellant had attempted to secure the discharge of the deceased from his employment on the day before the killing; and (3) that the court erred in denying appellant's motion for a new trial upon the ground of misconduct of the jury. We shall not discuss the last two errors assigned because they are without merit, and besides are wholly unimportant.

But we are satisfied, after an examination of the record, that the conduct of the trial court amounted to a comment upon the facts, and that, for this reason, the first assignment of error is a meritorious one. It appears that, at the close of the evidence, while the appellant was upon the witness stand giving evidence in his own behalf, and after he had been examined by his own counsel and cross-examined by the prosecuting attorney, the judge left his seat upon the bench and stood near the appellant, who had been illustrating his evidence by a plat upon the floor in front of the jury, and subjected the appellant to the following examination:

"The Court: Did you see him before he saw you? Answer: Yes, sir. The Court: Did you holler at him before he saw you? A. Yes, sir. The Court: Could he see you up there? A. He could see about half of me. The Court: When he went in the front, did you expect him to come around there to fight you with a pistol? A. Yes, I sup-

posed he would come in the kitchen and shoot. The Court: Did you go out with the expectation of fighting him with a pistol? A. He had a pistol. He said, 'I have to blow you out and eat your heart.' The Court: Did you go out intending to shoot him? A. I was standing in the door when I saw the revolver like that, just like that, I saw him like that. The Court: He didn't see you? A. No, I said, 'Stop, don't you come here any more, keep away from here.' I said that three times in combination. I was afraid he would shoot me. I shot like that and turned this way. I turned back this way. He turned this way. Then I go this way. I run this way and found a fence. The Court: Before you went out then, you thought he was going around this way to shoot you? While you were in the house you thought he was going around to shoot? A. When I started out? The Court: Did you think he was going out with his pistol? A. I was looking to see what he done, when I saw him like that. I said, 'Dominic, stop, get out from here.' He was coming as fast as he can and I jumped off like that. I went this way and he went that way. The Court: You thought, didn't you, that he was going around there to shoot? A. Yes, he told me. The Court: You went out there with a pistol expecting to meet him and have a shooting scrape with him? A. I was shooting for my life. The Court: Did you say to him anything about going out to shoot? A. No sir, I did not. I was telling him to take off his revolver and coat and everything and go out and fight a fist fight. . . . The Court: If you had stayed inside, wouldn't you have been safe? A. This door been closed. The Court: When he went outside, if you had stayed inside, wouldn't you have been safe? A. If I stay in this room he come in and shoot me in the door. Then I would have been dead where he is now. If I stop in this room, he would kill me. I go out doors and then I see him coming this way with a revolver. I said, 'Dominic, stop, keep away from here.' Then I shoot and I run this way and he that way. The Court: At the time you stepped out and shot was he aiming his revolver at you? A. He didn't know where I was. The Court: He didn't know where you were when? A. When I hollered he was looking, he didn't know whether I was close to the fence or at the house."

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There can be no doubt that the court, by such questions as the following: "You went out there with a pistol expecting to meet him and have a shooting scrape with him?" "Did you say anything to him about going to shoot?" "If you had stayed inside, wouldn't you have been safe?" "When he went outside, if you had stayed inside, wouldn't you have been safe?"—clearly conveyed the idea to the jury that the appellant was at least guilty of manslaughter, and that the plea of self-defense was not *bona fide*, in the opinion of the court. These questions are in the nature of a cross-examination by the prosecuting attorney, and calculated to discredit the witness. They would not be improper if asked by that officer, but when asked by the trial judge, they show his opinion of the case, rather than a desire on the part of an impartial judge to permit the witness to make his evidence more clearly understood. The examination of the appellant in this case was, we think, more clearly within the constitutional inhibition than the examination in *State v. Crotts*, 22 Wash. 245, 60 Pac. 403, where we said:

"There are different ways by which a judge may comment upon the testimony, within the meaning of the constitution referred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues. This information can be conveyed as readily to the jury by leading questions asked of them, and the manner of the judge in asking such questions, as by a direct comment upon the testimony in the charge to the jury."

The *Crotts* case was reversed solely upon the ground that the examination of a witness by the court amounted to a comment upon the facts. While the evidence in this case may show that the appellant is guilty of the crime of manslaughter, yet the appellant has a constitutional right to have the question of his guilt determined by a jury uninfluenced by the opinion of the trial judge.

The judgment must therefore be reversed, and the cause remanded for a new trial.

DUNBAR, CROW, ROOT, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

(No. 5530. Decided July 21, 1905.)

FRANK DUMONTIER *et al.*, Respondents, v. STETSON & POST
MILL COMPANY, Appellant.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ABSENT WITNESS—AFFIDAVIT OF—DISCRETION. The affidavit of the witness, or good cause for its nonproduction, being required by Bal. Code, § 5076, it is not an abuse of discretion to refuse a new trial on the ground of newly discovered evidence, where the witness lived in Spokane and his affidavit was not produced, after twenty days continuance of the motion, and where the appellant knew of his whereabouts during all said time and merely affirms that the witness was (now) temporarily absent from his place of business and that he had been unable to procure his affidavit after making every effort to do so.

SAME—ABSENCE OF WITNESS—REQUEST FOR CONTINUANCE. It is not an abuse of discretion to refuse a new trial for newly discovered evidence, where the existence of a material witness, who could not be found, was at all times known, and his residence was discovered before the close of the trial, but not in time to produce him, and the appellant did not seek a continuance on account of the absence of the witness or ask any postponement of the trial for the purpose of producing the evidence.

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—NEGLIGENCE OF SERVANT—UNLOADING LUMBER—EVIDENCE OF NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries sustained through the

¹Reported in 81 Pac. 693.

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fall down a hill of a load of lumber, being delivered by the defendant's teamster to the plaintiff, at the edge of a steep bluff, there is sufficient evidence to sustain a verdict for the plaintiff, where it appears that the wagon was so constructed that the entire load could be unloaded at one time, that the teamster had commenced to unload by throwing pieces down the hill, that plaintiff, after giving directions as to the manner of unloading, went down the hill to straighten boards thrown down, and while there with notice to the teamster, the entire load was unloaded at once, and slipped down the hill, striking the plaintiff and causing the injury, and where the jury inspected the premises, and the hill was not so steep but that persons could walk up or down, and were in the habit of doing so; and the questions of negligence and contributory negligence are for the jury.

SAME—LIABILITY OF MASTER TO THIRD PERSONS. Defendant, who sold a load of lumber to the plaintiff, is liable for personal injuries sustained by the plaintiff through the negligent acts of the defendant's servant in unloading the lumber.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 9, 1905, upon the verdict of a jury rendered in favor of the plaintiffs, for personal injuries sustained through the fall of a load of lumber, delivered by defendant to plaintiffs. Affirmed.

Kerr & McCord, for appellant.

Vince H. Faben and *Martin J. Lund*, for respondents.

HADLEY, J.—This is an action for damages for personal injuries received by the plaintiff Mary Dumontier. The plaintiffs are husband and wife. Their amended complaint avers, that on August 13, 1903, said Mary Dumontier purchased from the defendant, at its mill in the city of Seattle, one wagon load of lumber, to be delivered and unloaded by the defendant at the plaintiffs' home, on Beacon hill, near Fourteenth avenue south and Walker street, in said city; that on the following day said load of lumber was brought to plaintiffs' home on defendant's wagon, hauled by defendant's team, and in charge of one of defendant's teamsters, whose name is to plaintiffs unknown; that plaintiffs' home is situated upon a sidehill, on rising and steep ground;

that, after plaintiffs had paid for the lumber, defendant's teamster commenced to unload it in such manner that Mary Dumontier believed it would slide down the hill and be broken, and she requested him not to unload it in that manner; that, before she made said request, the teamster had thrown two boards so that they had slidden down the hill; that, after the plaintiff had made said request, she went down the hill to pick up the boards so thrown; that the wagon was so constructed that the entire load could be unloaded at once, and while she was down the hill below the wagon, after she had picked up one of the boards, while she was in the act of picking up the second one, and while she was in full view of the teamster, the latter, knowing that she was there, carelessly and negligently unloaded the whole load of lumber at once; that the same slid down the hillside, and in its descent caught said plaintiff, knocked her down, and buried her under it, causing her great bodily injury. The nature of the injuries is set forth and damages are demanded. A general demurrer to the complaint was overruled, and the defendant answered. It is not denied that the lumber was purchased as alleged and hauled by defendant's teamster, but other material averments were denied, and contributory negligence was affirmatively pleaded. The cause was tried before a jury, and a verdict was returned for the plaintiffs in the sum of \$3,500. The defendant moved for a new trial, which was denied, and judgment was rendered for the amount of the verdict, from which defendant has appealed.

Errors are assigned upon the refusal of the court to give two requested instructions. We think, in effect, the same subject-matter was covered by instructions given, and we believe it is unnecessary to discuss these assignments. No prejudice resulted to appellant from mere failure to give the instructions in the requested form.

Appellant's chief contention is that the court erred in denying its motion for a new trial. The first point urged

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under this assignment is that the new trial should have been granted because of newly discovered evidence. The teamster who was in charge of the delivery wagon at the time of the accident was not present at the trial. It appears that he and the injured respondent were the only persons present at the time of the accident. In support of the motion for a new trial, the president of the appellant corporation made affidavit that the teamster, if present, would testify to facts materially different from the testimony of the injured respondent; that the teamster left the employ of appellant within a few days after the accident occurred; that the suit was not commenced until nearly a year after the accident, and the appellant, knowing nothing of the family or former residence of the teamster, and not anticipating that any action would be brought, made no effort at the time to keep informed as to his whereabouts; that, after the commencement of the action, and until the time of the trial, the appellant sought to find him, but could get no trace of him; that at the time of the trial appellant was unable to state that there was any probability of procuring the testimony of this witness, for the reason that it was impossible at that time to find any trace of him for the purpose of procuring his testimony; that since the trial appellant has learned that the witness resides in Spokane, and that he is now temporarily absent from his place of business, but that appellant can procure his testimony, if a new trial shall be granted. The affidavit further states that, during the trial of the case and after the testimony was all taken, a former friend of the teamster informed appellant that the teamster resides in Spokane; that appellant has been making every effort to procure his affidavit, and will be able to procure his testimony at a subsequent trial, provided the same shall be reassigned for a period not later than thirty days hence.

Upon filing the motion for new trial, the court granted twenty days for the purpose of procuring affidavits. The affidavit of this witness residing in Spokane was not pro-

cured. Bal. Code, § 5076, requires that the affidavit of the witness, showing what his testimony will be, shall be produced, or good reasons shown for its nonproduction. The affidavit of the president of the appellant company above mentioned was verified just twenty days after the filing of the motion for new trial. It states that the witness was then temporarily absent from Spokane, but does not state that he was so absent during the entire time of the preceding twenty days. Inasmuch as it appeared that appellant was advised of the witness' location before the close of the trial, the trial court may have considered that, under the circumstances, good cause was not shown for the nonproduction of the witness' affidavit. Such questions arising upon motion for new trial are addressed to the sound discretion of the trial court, and in the absence of abuse of such discretion an appellate court will not interfere. *Wait v. Robertson Mtg. Co.*, 37 Wash. 282, 79 Pac. 926.

Moreover the testimony of this witness cannot well be called newly discovered evidence. The existence of the witness, and his presence at the time of the accident, were known to appellant both before and during the trial. The essence of appellant's contention seems to be based rather upon the absence of a witness whose testimony was known than upon the ground of newly discovered evidence. *State v. Lamothe*, 37 La. Ann. 43. No delay or request for continuance was asked at the time of the trial because of the absence of this witness. True, the president's affidavit states that such request was not made for the reason that appellant could not state the probability of procuring the testimony at another time, because it had been unable to find the location of the witness. While this was true at the beginning of the trial, yet before its close appellant had discovered the residing place of the witness.

"The testimony upon which a new trial is asked must have been discovered since the trial. If the testimony was discovered before the close of the trial, and even after argu-

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ment, but before submission to the jury, it will not constitute newly discovered evidence, since the applicant could have informed the court and offered such testimony at that time, or, if the witnesses were not at hand, could have obtained a continuance." 14 Ency. Plead. & Prac., p. 796. See, also, *Bailey, Wood & Co. v. Landingham*, 52 Iowa 415.

In *Hendrickson v. Tracy*, 53 Minn. 404, 55 N. W. 622, it was held that an application for a new trial will not be granted when the testimony is known at the time of the trial, and no postponement is sought to enable the party desiring the testimony to ascertain the whereabouts of the witness and procure his testimony.

"If he desired the hearing postponed, in order to procure absent witnesses, as is claimed in his brief, he should have made a showing to the court, by affidavit or other testimony, stating the names of the absent witnesses, what they would testify to if present, and the efforts used to procure their attendance. A party cannot wait until after trial and verdict, and then, for the first time, complain that he went to trial without his witnesses being present, when he was aware of their absence before the trial commenced." *Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365.

In *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147, this court said:

"A new trial for reasons not authorized by law is an injury and loss to the party who has prevailed in the first trial; also, the public good requires that there be an end to litigation. It is a maxim of the law that a man shall not be twice vexed for one and the same cause."

We do not find that the court abused its discretion in denying the motion for new trial on the ground above discussed.

Another reason assigned why the motion for new trial should have been granted is that the evidence was insufficient to justify the verdict. This contention also involves contributory negligence. It is argued that the hill was almost perpendicular, and that it was a physical impossibility for the respondent to have walked down and picked up the

pieces of lumber, as she testified. It is also contended that her evidence showed that, at the time she stepped over the bluff, the teamster had started to the heads of his horses for the purpose of backing the rear end of his wagon to the edge of the bluff, and that he was therefore not in position where he could see her, from the very nature of the contour of the ground; that she was better able to see the wagon than the teamster was able to see her, and that, if she had used her ordinary senses, she could have seen the lumber as it was being unloaded, and avoided the danger.

The jury inspected the premises, and saw the physical conditions. There was testimony that the hill was steep, but that persons could walk down or up, and that children were in the habit of running up and down the bluff. The respondent testified as follows:

"When he brung the team some of the lumber fell out, some of the lumber that was on top, and he throwed it down the hill; instead of throwing it down straight he throwed it across. And I told him I did not want the lumber to be broken up like that, to throw it down straight and he said it would go down anyway. Well, when he asked me to give him the money, and I gave him his money—I gave him his money, and told him, 'I will go down the hill and I will throw that lumber down.' And he went towards the team, and he said 'All right'; and he went towards the team; and the team was turned this way (illustrating), and after I went down the hill he changed the team. . . . No sir, he just—he said 'All right' when I said I would go down and straighten the boards, I didn't want the lumber to break up, I wanted him to throw it down straight, and he said 'All right,' and he went towards the wagon and I went right straight down to where the lumber was; and I just put one down and throwed one on one side, and I picked up another one to throw it and the lumber came down on me, and I didn't know any more."

We think it does not appear that it was physically impossible for the accident to happen as testified, and, under the evidence, the questions of negligence of the teamster and of

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respondent's contributory negligence were properly for the jury to determine. The jury must have found against contributory negligence, and that the negligence of the teamster was established. The liability of appellant follows, and a verdict against it was authorized, for the reason that employers and masters are answerable for damages resulting from the acts of their servants committed while in the exercise of the functions of their employment and incidental thereto. For authorities applicable to a case of this kind, see the following: *Holmes v. Tennessee Coal, Iron & R. Co.*, 49 La. Ann. 1465, 22 South. 403; *Keep v. Walsh*, 44 N. Y. Supp. 944; *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. 279; *Ridge v. Railroad Transfer Co.*, 56 Mo. App. 133; *Lovington v. Bauchens*, 34 Ill. App. 544.

It is urged that a new trial should have been granted because the verdict was excessive. After an examination of the testimony as to the nature of the injuries, having in view all the testimony upon the subject and the fact that the trial court, who saw the respondent and heard all the witnesses, has, by the denial of a new trial, found that the amount is not excessive, we believe we are not justified in finding otherwise. We therefore think it was not error to deny the motion for new trial, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

(No. 5463. Decided July 21, 1905.)

CHARLES THAM, *Respondent*, v. THE J. T. STEEB SHIPPING COMPANY, *Appellant*.¹

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MASTER AND SERVANT—NEGLIGENCE—OPEN AND OBVIOUS DANGERS—ASSUMPTION OF RISKS. Where the dangers incident to the employment are alike open and obvious to the master and servant, the parties are upon an equality, and the master is not liable for an injury to the servant resulting therefrom.

¹Reported in 81 Pac. 711.

APPEAL—REVIEW—ERROR FAVORABLE TO APPELLANT—TRIAL—INSTRUCTIONS. The giving of an erroneous instruction, favorable to the appellant, is not prejudicial error although it conflicts with other correct instructions.

APPEAL—REVIEW—NEW TRIAL—ERRORS OF LAW. The granting of a new trial solely for supposed error in an instruction, will be reversed on appeal for error of law where the instruction was correct, no judicial discretion being involved.

Appeal from an order of the superior court for Pierce county, Snell, J., entered August 29, 1904, granting a new trial, for error of law, upon motion of the plaintiff, after a trial and verdict in favor of the defendant, in an action for personal injuries. Reversed.

James M. Ashton and W. H. Hayden, for appellant.

W. H. Harris, for respondent.

Root, J.—Respondent, while working for appellant upon a scow by the side of the ship "Robert Adamson," was knocked from said scow by a sling-load of lumber, swung from the rail of said ship. In falling, he struck upon the railing of a naphtha launch, lying alongside the scow, and suffered a broken leg. He brought suit for damages. At the trial, a verdict was returned in favor of the defendant.

A motion for a new trial was duly made, and was granted by the trial court, solely upon the ground that two of its instructions were inconsistent with, and contradictory to, each other, and that one of them, number 18, hereinafter referred to, was not the law. Appeal is taken from this order. Said instruction number 18 was in the following language:

"If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."

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The other instruction is number 27, and is as follows:

"Under the law of this state the master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master. The servant has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicion of danger. If, therefore, the master orders the servant into a place of danger and the servant is injured he, the servant, is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it."

We are unable to agree with the learned trial judge that instruction number 18 is not the law. This instruction is taken, in substance, from the opinion of this court in *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410. The law as set forth in the instruction is recognized in that case, and in the following cases from this court: *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126.

We do not think that this instruction is necessarily in conflict with instruction number 27. The idea sought to be conveyed by the latter is correct to the effect that the master and servant do not always stand upon an equality. The language in 27 is not apt, and some of the statements, taken alone, are not correct as propositions of law; but the substance, taken as a whole, would be proper in an appropriate case—as, for instance, where there is little appearance of danger, but where the master, by superior knowledge, is aware of dangerous conditions not recognized by the servant. Respondent excepted to the giving of instruction number 18. He did not except to the giving of instruction number 27, and had no occasion to do so, as it was favorable to him. Number 18 being a correct statement

of the law, it follows that respondent had no just complaint because of its being given; and he could not be prejudiced, even if 27 did conflict, for the reason that whatever effect 27 would have, as against 18, would be in his favor. If the trial court's views of 18 were correct, the motion for a new trial would have been properly granted; but as, in our opinion, the statement of law in 18 is correct, the action of said court in granting said motion was erroneous.

Ordinarily this court is very reluctant to set aside the action of the trial court in granting a new trial. In this case, it was suggested in respondent's brief that the trial court believed the evidence insufficient to sustain the verdict, and would have granted the new trial upon that ground, had it believed it had the power to thus review the action of the jury. Had the learned judge granted the motion upon this ground, or upon any ground involving sound judicial discretion, his action would not likely have been disturbed. But the record fails to show such facts. On the contrary, it shows that the trial judge stated expressly that the evidence and facts were such that reasonable men might properly reach different conclusions thereupon, and he based his decision solely upon the conflict and inconsistency which he believed to exist between said instructions 18 and 27. Hence, a clear question of law is presented, upon which we are unable to reach the same conclusion as that arrived at by said court.

The judgment of the honorable superior court will therefore be reversed, with instructions to enter judgment upon the verdict.

MOUNT, C. J., CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

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Opinion Per RUDKIN, J.

(No. 5541. Decided July 21, 1905.)

LOUIS PETERSON *et al.*, Appellants, v. CHARLES BAKER *et al.*,
as County Commissioners *etc.*, Respondents.¹

HIGHWAYS—PUBLIC LAND—SCHOOL SECTION—GRANT BY CONGRESS—RESERVATION FOR PUBLIC USE—CONSTRUCTION. The right of way over public lands except those reserved for public use, granted by U. S. Rev. Stats., § 2477, for the construction of public highways, applies to school sections 16 and 36; since U. S. Rev. Stats., § 1947, reserving such sections for the use of the common schools was but a declaration of governmental policy and did not reserve them for public use so as to except them from the operation of the grant; hence the maintenance of a public road over a school section for more than seven years establishes a valid subsisting public highway under Bal. Code, § 3846.

Appeal from a judgment of the superior court for King county, Richardson, J., entered September 21, 1904, in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action to enjoin the maintenance of a public highway. Affirmed.

Fred H. Peterson and *H. C. Force*, for appellants.

Kenneth Mackintosh and *Ernest B. Herald*, for respondents.

RUDKIN, J.—On the 4th day of March, 1903, the plaintiffs purchased from the state of Washington all of tract 3, of section 16, township 24, north, range 4, east of the Willamette Meridian, in King county, and are still the owners thereof. As such owners, they brought this action to restrain the defendants, as county commissioners of King county, from opening up or maintaining a public highway across the land so purchased. It was conceded that the road in question has been maintained across said tract since prior to the year 1876, and that such road has been kept up at public expense, and used continuously, ever since its estab-

¹Reported in 81 Pac. 681.

lishment. The court below dismissed the action, and from the judgment of dismissal, this appeal is prosecuted.

The respondents claim that there is a valid subsisting public highway across this land; first, by virtue of U. S. Rev. Stats., § 2477, which provides that, "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted;" and, second, by virtue of Bal. Code, § 3846, which provides that,

"All public roads and highways in this state that have been used as such for a period of not less than seven years, and are now so used, where the same have been worked, and kept up at the expense of the public, are hereby declared to be lawful roads and highways within the meaning and intent of the laws now existing governing public roads and highways in this state."

The appellants, on the other hand, contend that no right of way was granted by the act of Congress above referred to, for the reason that the land in controversy was school land and was therefore, "reserved for public uses;" and that the state statute does not apply because the county authorities failed to comply with § 46 of the act of March 26, 1895 (Laws 1895, p. 547), or with § 35 of the act of March 16, 1897 (Laws 1897, p. 246), relating to public highways over state lands.

U. S. Rev. Stats, § 1947, provides as follows: "Sections numbered sixteen and thirty-six in each township of Washington Territory shall be reserved for the purpose of being applied to common schools in that territory. In all cases where sections sixteen and thirty-six, or either or any of them, are occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which such sections so occupied are situated are authorized to locate other lands, to an equal amount in sections or fractional sections, as the case may be, within their respective counties, in lieu of the sections so occupied."

The act of which this section forms a part became a law March 2, 1853. U. S. Rev. Stats., § 2477, provides that,

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"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The act of which this section forms a part became a law July 26, 1866.

Were school lands in the territory of Washington *reserved for public uses* by § 1947, *supra*, so as to except them from the operation of § 2477, *supra*? We are clearly of the opinion that they were not. The act of March 2, 1853, was simply a declaration of governmental policy, and the title to sections 16 and 36 thereafter remained in the general government, subject to the dominion and control of Congress, until otherwise appropriated or disposed of. Thus, in *Barkley v. United States*, 3 Wash. Ter. 522, 19 Pac. 36, it was held that sections 16 and 36 were public lands of the United States, within the provisions of the act of February 25, 1885, entitled, "An act to prevent unlawful occupation of public lands." The same conclusion was reached in *United States v. Elliot*, 12 Utah 119, 41 Pac. 720, and in *United States v. Bisel*, 8 Mont. 20, 19 Pac. 251. In *Burrows v. Kimball*, 11 Utah 149, 41 Pac. 719, it was held that school lands were reserved to the United States and under the actual control of Congress, until granted to the state or territory. The direct question here presented was before the supreme court of South Dakota in *Riverside Township v. Newton*, 11 S. D. 120, 75 N. W. 899. In that case the court says:

"Do the foregoing provisions of the Compiled Laws apply to school sections, is the decisive question, which must be answered affirmatively, unless by the act of Congress above quoted the same were 'reserved for public uses.' The mere announcement of a governmental policy to withhold, when the same shall be surveyed, specified portions of the public domain from settlers and purchasers, 'for the purpose of being applied to schools of states hereafter to be erected,' is neither a grant nor reservation 'for public uses.' The act of Congress granting the right of way for the construction of highways over public lands, construed with the provisions of our statute, creates an easement of which respondent had

notice, operating uniformly upon all section lines, including the boundaries of school sections designed to be leased or sold by the state for the purpose of creating a trust fund for the benefit of the public schools. Such lands are not reserved for, nor are they put to, a public use. Section 2364 of the United States Revised Statutes, when considered with other provisions relating to the same subject, tends to negative the idea that such lands were reserved for public uses by providing that 'whenever any reservation of public lands is brought into market, the commissioner of the general land office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.' Our conclusion therefore is that the lawmakers have reserved and located a highway along the school section line in question, which appellant is authorized to open and prepare for the use of the public, without allowing respondent any compensation in the way of damages."

See, also, *Coleman v. St. Paul etc. R. Co.*, 38 Minn. 260, 36 N. W. 638; 26 Am. & Eng. Ency. Law (2d ed.), 357.

We are therefore of opinion that the land in controversy was not "reserved for public uses," within the meaning of the exception or reservation contained in section 2477 of the United States Revised Statutes, and that there is a valid and subsisting public highway across the appellants' lands, under the facts agreed upon in this case. It therefore becomes unnecessary to decide the other questions presented on this appeal. There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., ROOT, CROW, and HADLEY, JJ., concur.

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Syllabus.

(No. 5468. Decided July 21, 1905.)

BERNARD HART, *Respondent*, v. CASCADE TIMBER COMPANY,
Appellant.¹

TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION. It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws 1903, p. 50, and error cannot be predicated thereon.

APPEAL — REVIEW — EVIDENCE — CONCLUSION — HARMLESS ERROR. The admission of evidence objected to on the ground that it is a mere conclusion of the witness is harmless where the witness had previously given substantially the same testimony without objection.

SAME—EVIDENCE STRICKEN OUT. Error cannot be predicated upon an incompetent voluntary statement of the party, when being examined as a witness, which was immediately stricken out on motion of the appellant.

MASTER AND SERVANT — NEGLIGENCE — EVIDENCE — SUFFICIENCY — QUESTIONS FOR JURY. In an action for personal injuries sustained by a logger caught between a log and a car, by reason of slack in a cable upon the drum of a logging engine, the minds of reasonable men may differ, and the evidence makes a case for the jury, on the questions of negligence, contributory negligence, assumed risk, and negligence of a fellow servant, where witnesses testified that the drum was constructed to be used with a brake to take up the slack in the cable, that the appliances used in place of a brake upon the drum were unsafe and dangerous, that plaintiff knew nothing whatever concerning them or their operation, that the fellow servant, the engineer, operated the same with due care and took up all slack in the cable before applying the power, and that the plaintiff was injured through the failure of the appliances to take up the slack as would have been done in case the brake or a suitable appliance had been used, notwithstanding evidence that it was not customary to use a brake, the same being dispensed with to lessen the labor of the loading crew.

DAMAGES—EXCESSIVE VERDICT—REDUCTION. A verdict for \$5,000 damages for personal injuries sustained by a logger who was caught between a log and a car and both of his thighs broken, is excessive and should be reduced to \$3,500, where it appears that he had substantially recovered, and would sustain no permanent injury impairing his earning ability, and that \$1,500 would fully compensate him for his loss of wages, and where no claim is made for medical attendance.

¹Reported in 81 Pac. 738.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered June 17, 1904, upon the verdict of a jury rendered in favor of the plaintiff for \$5,000 damages for personal injuries sustained by a logger engaged in loading logs. Affirmed, on condition of the remission of \$1,500.

Reynolds & Griggs, for appellant.

A. J. Speckert, James F. O'Brien, and Charles O. Bates, for respondent.

CROW, J.—This action was instituted in the superior court of Pierce county to recover damages for personal injuries. A verdict for \$5,000 being rendered in favor of respondent, and final judgment entered thereon, this appeal has been taken.

At the time of the accident complained of, appellant was engaged in the logging business, at a certain camp on the Tacoma Eastern Railroad, using a certain donkey engine to bring in logs from the woods and load the same upon cars. The donkey engine had two certain drums or cylinders, around which lines of cables were wound. The lower one towards the front was known as the main line drum, and the upper or rear one as the loading drum. The lines upon said drums were cables. The main line, being about 1,000 feet in length, was used for the purpose of drawing in logs from the woods to a certain loading platform located near the railway track, about thirty feet from, and in front of, the donkey engine. The shorter line upon the loading drum was used for the purpose of hauling logs from the loading platform onto the cars. This line passed through a block attached to certain timbers on which the engine rested, passed therefrom through a block at the top of a gin pole immediately over a car, and then dropped to the point where the loading was being done.

Respondent, an employee of appellant, was one of the load-

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ing gang, being known as the ground loader. The donkey engine had a brake upon the long line drum, and, as originally built, also had a brake upon the loading drum. The latter brake, however, was not used. As it had been placed upon the loading drum to create friction and prevent the loading line from becoming slack, it became necessary, in its absence, to adopt some other contrivance for preventing such slack, in order that the cable of the loading drum might be prevented from falling upon the main line drum. For this purpose, a certain iron roller was first placed upon stanchions standing immediately in front of the main line drum, the line from the loading drum passing over, and the main line under, said roller, which respondent claims was located at a height sufficient to prevent the slack of the loading line from falling upon the main line drum.

About one week prior to the accident, it became necessary to remove the main drum, and make certain repairs, which were made by the engineer and appellant's master mechanic. In order that said main drum might be removed, it became necessary to take out the iron roller above mentioned. Afterwards, instead of replacing the iron roller, the master mechanic suspended wires from two wooden stanchions in front of the engine, each of said wires falling down in the form of a loop, and in said loops placed a stick, and passed the line from the loading drum over, and the line from the main drum under, such stick; the intention being that said device should take the place, and perform the functions, of the iron roller which had been removed. There is evidence tending to show that at the time of this change the engineer, who assisted in the repairs, complained to his superior, the master mechanic, that the new contrivance was unsafe and dangerous. This statement, however, is denied by the master mechanic.

On the day of the accident, respondent was engaged in loading a certain log, and in so doing he fastened the end of the line from the loading drum around the log, and gave a

signal to the engineer to apply power to the loading drum. This the engineer did, but the log, being irregular in form, did not pass evenly upon certain skids which were being used in loading, one end of the log falling below and behind one of said skids. Thereupon respondent signaled the engineer to turn off the power, which being done, respondent, taking a peevy or cant hook, stepped in between the log and the car, for the purpose of pushing or rolling the log back into a proper position. By reason of the line from the loading drum being attached to the log, it was very taut, and when the power was released, the loading drum having a tendency to revolve in an opposite direction, it became slack.

While respondent was in the position just described, the engineer received a signal to apply power to the main line drum for the purpose of drawing another log from the woods. The engineer testified that before doing so he took up all the slack in the loading line. Thereupon he immediately applied the power to the main line drum, which began to revolve and draw the log from the woods. When about 100 feet of the main line had been drawn in, the slack of the loading line fell upon the main line, was caught, and began to wind around the main drum. This caused the loading line to draw the log to which it was attached toward respondent, crushed him against the car, and broke each of his thigh bones.

Respondent alleged negligence of appellant: (1) In failing to maintain a brake upon said loading drum; (2) in failing to maintain a proper and reasonably safe appliance for keeping the lines apart, and preventing the loading line from falling upon the main drum. Respondent also contended, that the stanchions and iron roller, originally placed in front of the main line drum, constituted a proper and reasonably safe contrivance for keeping said lines apart; that the stick suspended from the wires, which was afterwards substituted therefor, was an improper and dangerous appliance; and that the absence of the brake from the loading

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drum, and the use of such stick of timber suspended from said wires, were the proximate cause of his injuries. Respondent also alleged, that his duty in no way required him to have anything to do with the engine or its appliances, or to have any knowledge thereof; that he was ignorant of the dangers arising from the absence of said brake or the use of said improper appliance; that he was entirely without fault, and that said injuries were the direct result of the negligence of appellant in failing to provide reasonably safe appliances or machinery for the use of its servants. Appellant has assigned numerous errors which we will consider in their order.

(1) It is first contended that the trial court erred in calling a jury to try the cause, appellant claiming respondent had waived a jury trial, and that no jury fee had been deposited, prior to the calling of the case for trial. There is no merit in this contention. *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209.

(2) The engineer, being a witness for respondent, was asked, "Would the accident have happened if the roller had been there instead of the pole?" and answered, "No, sir." The motion of appellant to strike the answer as a mere conclusion was denied, and upon this ruling error is assigned.

In *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, this court said:

"It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And the exception is not confined to the evidence of experts who may give opinions on questions requiring special skill, knowledge or learning, but includes the evidence of common observers who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time."

The record shows that the witness, without objection, had previously given substantially the same testimony, saying he

had told the master mechanic the pole would not work as good as the roller, and some one was going to get hurt on it. We therefore do not think prejudicial error was committed in permitting this question and answer to stand.

(3) Respondent, as a witness in his own behalf, after testifying about his position, and as to how the log had been drawn against him, was asked: "Well, what was done to you then, Barney?" and answered:

"Well, I fell across the log, and Johnny, the engineer—I hollered, and the engineer came running, and he says, 'You ain't hurt'; and I says, 'Only two legs broke,' and he says, 'I told him to fix that roller or some one would get hurt on it.'"

Appellant immediately moved the court to strike the answer, and it was stricken. Appellant now contends that this was a voluntary statement of respondent, and that, when the answer was once given, irreparable mischief was done, although it was stricken, and insists that the order striking the answer could not, and did not, cure the prejudicial error.

We do not think the contention of the appellant can be sustained. We find nothing in the general testimony of respondent to show that he was undertaking to make improper or voluntary statements, nor is there anything to indicate that the statement was suggested to him, or in any manner drawn out by his counsel. If this court were to reverse a case every time a witness, in the presence of a jury, innocently volunteers an improper or irrelevant statement, which appellant regarded as prejudicial, very few judgments of a trial court would be sustained. The statement having been withdrawn from the jury, we fail to find that appellant was prejudiced by the incident.

(4) At the close of the respondent's evidence, appellant moved for a nonsuit, which was denied. The principal points relied upon in support of said motion were contributory negligence, assumed risk, negligence of fellow servant, and a

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contention that, from the evidence introduced on behalf of respondent, it clearly appeared that appellant, in providing machinery and appliances to be used by his servants, had exercised ordinary and reasonable care and was guilty of no negligence whatever.

Upon the question of contributory negligence, it is a well established principal that such issue will not be withdrawn from the consideration of the jury, when the minds of reasonable men might differ as to whether or not such negligence in fact existed. *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Cook v. Stimson Mill Co.*, 36 Wash. 36, 78 Pac. 39. From an examination of the evidence in this case, we are satisfied that the issue of contributory negligence was properly submitted to the jury. What has been said as to the issue of contributory negligence is true, also, as to that of assumed risk. There was positive evidence to the effect that respondent knew nothing of the construction, management, or use of the engine or its appliances; that he had nothing whatever to do with providing or operating the same; and that he had not been advised as to any dangers attendant upon the use of such engine or appliances. This was the testimony, not only of respondent himself, but also of the engineer. Appellant contends that respondent assisted in the arrangement of this very stick which was substituted for the iron roller and used at the time of the accident. While there was some evidence upon this point, the question of his knowledge, or means of knowing what danger, if any, existed, was one upon which the evidence was sufficiently conflicting to warrant the issue of assumed risk being referred to the jury.

Upon the issue of negligence of a fellow servant, it was contended by appellant that the accident was the result of the negligence of one John Sipe, the engineer, respondent's fellow servant, in failing to take up the slack of the loading line before operating the main line drum, and that such negligence was the sole and proximate cause of the accident.

Substantially all evidence bearing upon this question, and introduced by respondent, tends to show that the engineer did take up the slack of the loading line before applying power to the main line drum; respondent's theory being that, after the main line drum was started, its motion and the rising and falling of the suspended stick, caused the loading drum, in the absence of its brake, to revolve, producing slack in its line, which becoming entangled with the main line caused the accident. Upon the evidence it was certainly a question of fact, to be decided by the jury, whether or not the respondent's fellow servant was guilty of negligence, and this issue was also properly submitted.

The main contention of appellant upon the motion for a nonsuit seems to be that it had fully discharged its duty as master in selecting machinery and appliances to be used by its employees. It contends that the absence of a brake from the loading drum was not negligence, for the reason that the universal custom of those operating donkey engines in logging camps is to operate such drum without a brake; that the brake had been removed for the benefit of the loading crew, whose duty it was to draw out the line from the loading drum; that, as the brake caused friction, the loaders objected to extra work and labor caused thereby, and that the brake was removed for their sole benefit.

It is true, the evidence fails to show that any brake was ever used on the loading drum of this engine. It is also true that the evidence utterly fails to show that, in the operation of donkey engines in logging camps generally, it was customary to use such a brake. Doubtless the brake was removed for the purpose of lightening the labor of the men who drew out the line. The engine, however, as originally constructed, contemplated the use of such a brake, and it might readily be inferred from the evidence that the very fact of the removal of the brake necessitated the iron roller, or some other proper appliance, in front of the engine, to keep the lines apart and prevent accidents. The brake be-

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ing removed, it might then become necessary to determine what was a proper and reasonably safe appliance to accomplish this purpose. Upon this point the evidence is conflicting. Witnesses for respondent testified that the pole suspended from the wires was improper, unsafe, and dangerous; while witnesses for appellant testified differently; some saying that the suspended pole was proper; others, that a stationary pole was proper; and another, that no such appliance whatever should be used, but that the engineer should constantly watch the slack and take it up by the use of the friction lever on the loading drum. We think that, under all the evidence as disclosed by the record, an issue arose as to whether the substitution of the pole for the iron roller, by the master mechanic, was or was not the adoption of a dangerous and unsafe appliance, or was the adoption of one that was reasonably safe and proper, and that this issue was one of fact to be decided by the jury. *Labatt, Master & Servant*, § 43; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Gaudie v. Northern Pac. R. Co.*, 34 Wash. 34, 74 Pac. 1009; *Swift & Co. v. Holoubek*, 60 Neb. 784, 84 N. W. 249; *McGregor v. Reid*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. 332; *Detroit etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *Ashman v. Flint etc. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Kyle v. Southern Elec. L. & Power Co.*, 174 Pa. St. 570, 34 Atl. 323.

(5) Numerous assignments of error are based upon the giving of certain instructions which were requested by respondent, and also upon the refusal to give other instructions requested by appellant. We will not enter into a specific or analytical discussion of the various instructions given or refused, but will say that we have carefully examined all the instructions given and refused and are convinced, (1) that, if any of the instructions given by the court at the request of respondent are subject to any criticism whatever, the same were amply cured by other instructions given at appellant's request; and (2) that all instructions requested

by appellant and refused by the court were fully covered by other instructions actually given. In fact, the instructions given by the court are complete and, as we think, correctly state the law.

(6) Appellant contends that the damages awarded, \$5,000, are excessive. From an examination of the entire record, and a most careful and painstaking consideration of the evidence, we are convinced that this contention should be sustained. While respondent suffered a most painful and serious accident, the evidence shows his recovery has been almost a perfect one. It is true, some of the testimony tended to show certain injuries to have still existed at the time of the trial, but it fails to show such injuries to be permanent. On the contrary, the weight of the evidence seems to be that, within a period of perhaps four or five months from the date of the trial, respondent would probably enjoy substantial or complete recovery. It also shows that he will be able to resume work at his occupation of logger; that he has a good pair of legs; that his system is in a healthy and well nourished condition; that the permanent injuries he has sustained, if any, are not of such a character as to impair the usefulness of his legs or prevent him from performing hard labor. The accident occurred on the 17th day of July, 1903, and the trial commenced about eleven months later, on the 14th day of June, 1904. At that time appellant had been walking, and although he carried a cane, he used it only a portion of the time. He was examined by competent surgeons appointed by the court, whose evidence disclosed a very substantial recovery. At the time of the accident, appellant was earning \$3 per day. Were we to concede that he had lost, at the time of the trial, and would thereafter lose, a sufficient amount of time to constitute in all eighteen months, his loss in wages could not exceed \$1,500. No claim is made for hospital fees or doctor bills, and we cannot assume any such claim existed. If respondent had been allowed \$1,500 for loss of time, and \$2,000 in addition thereto for

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pain and suffering and for any permanent injury which the evidence shows he may have actually sustained, such an award, making a total of \$3,500, would certainly be ample compensation.

It is not the province of the court to weigh testimony and determine the amount of damages that shall or shall not be awarded in any given case, but a duty does devolve upon the court to restrain juries from awarding verdicts unnecessarily large, or not warranted by the evidence. The purpose of awarding damages is to give compensation for loss or injury actually sustained, and when a sufficient amount has been awarded to accomplish such purpose, no additional award should be permitted. While we hesitate to interfere with the verdict of a jury estimating damages, we are nevertheless constrained to believe that an award in excess of \$3,500 should not, under the evidence, have been made in this action.

It is ordered that if, within thirty days from the filing of the remittitur herein, the respondent shall file with the clerk of the superior court of Pierce county, Washington, his written statement agreeing to accept a judgment for \$3,500, the judgment of the superior court be modified by reducing the damages awarded herein from \$5,000 to \$3,500, the latter sum to bear interest from the date of the trial. Upon the failure of said respondent to accept said sum of \$3,500 and interest within said time, it is ordered that a new trial be granted. The appellant will recover costs in this court.

MOUNT, C. J., ROOT, and RUDKIN, JJ., concur.

HADLEY and FULLERTON, JJ., took no part.

(No. 5553. Decided July 22, 1905.)

H. B. CLEMANS, as *Executor etc.*, Appellant, v. ADA H. WESTERN, Respondent.¹

DIVORCE—ABANDONMENT—EVIDENCE—SUFFICIENCY. A clear case of abandonment is shown, where, after the dismissal of an action for divorce brought by the wife on the ground of abandonment, the husband returned to the state of Washington, but not to his home, and refused for four years to live with or make any provision for his family, although requested to do so.

DIVORCE—DIVISION OF PROPERTY—ALL AWARDED TO WIFE. Upon granting a divorce to a wife on the ground of abandonment, and awarding to her the custody of three minor children, it is just to award her all the property, where it appears that it had been conveyed to her, heavily incumbered eight years before, the equity not exceeding \$2,500, and that the wife, unassisted, after eight years of hardship, had saved it from foreclosure and paid off more than \$3,000 of the indebtedness against it.

NEW TRIAL—ACCIDENT AND SURPRISE—ABSENCE OF WITNESS—FAILURE TO REQUEST CONTINUANCE. Accident and surprise cannot be urged as ground for a new trial in an action for a divorce, in that the appellant's son, alleged to be a material witness, suddenly disappeared during the trial and could not be produced, when the appellant failed to subpoena him as a witness, or to request a continuance, but submitted the case on other evidence without suggesting the fact that he relied upon his son's evidence.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 12, 1904, upon findings in favor of the defendant, after a trial before the court without a jury, granting a divorce and awarding property and the custody of children, upon a cross-complaint. Affirmed.

Jacobs & Jacobs and *Walter S. Fulton*, for appellant.

Smith & Cole, for respondent.

MOUNT, C. J.—This appeal is from a judgment of the lower court denying a decree of divorce to Henry H. Western, and granting a decree to respondent, and awarding her

¹Reported in 81 Pac. 824.

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the care and custody of the minor children, and all the property, which stood in her name. Since the appeal was taken, the appellant has died, and, upon stipulation, H. B. Clemans, executor of the last will and testament of the deceased, was substituted for the appellant.

The complaint, after alleging the marriage of the parties in April, 1882, and after alleging that three children had been born to them, viz., a son who is twenty years of age, and two daughters aged respectively fourteen and twelve at the time the action was begun, alleged, that at the time of the marriage the plaintiff, H. H. Western, was possessed of certain real property as his separate estate; that in May, 1896, being about to start for Alaska, he deeded all of his property, both real and personal, to his wife, in order to provide for her and the family and especially to provide for his family in case of his death; that there was no other consideration for said deed, and that at the time the deed was made the value of the property was \$20,000, subject to incumbrances amounting to less than \$6,000. The complaint then alleged that, in the years 1900, 1901, and 1903, the respondent committed certain specified acts of adultery, and prayed for a divorce, for the custody of the minor children, and for a just and equitable division of the property.

The answer of the respondent denied that the property was worth to exceed \$10,000, denied that the property was subject to liens less than \$6,000, but alleged that mortgages and judgment liens at that time amounted to \$7,500, and that unpaid bills amounted to many hundreds of dollars, and denied the acts of adultery. For a further defense the answer averred, that in the year 1894 respondent, out of her separate means, advanced to plaintiff the sum of \$1,400, in consideration that he would convey the real estate to her, subject to the mortgages then existing, which was done at that time; that in the year 1896, when by bad management the property had become depreciated in value and heavily incumbered, and plaintiff was unable to meet the interest

charges, mortgages maturing, judgments, unpaid taxes, and open accounts, he advised respondent that they abandon the property, which she refused to do; that thereupon plaintiff conveyed to respondent all of his property, both real and personal, and went to Alaska, leaving her to her own resources without other means of support; that, by her own energy and unaided, she has since that time paid the taxes, judgments, and accounts against her home, and reduced the mortgage indebtedness to the sum of \$4,200; that in 1896 the plaintiff abandoned the respondent and her children, and has neglected and refused to return to them, and has provided nothing for their support, although he has been at all times a strong and able-bodied man; that for three years last past he has been living in and about King county, where the action was begun, and that respondent has been at all times ready and willing to live with him, and has always been a dutiful, faithful, and affectionate wife. The answer prayed for a decree of divorce, and for the care and custody of the children.

The reply of the plaintiff denied the allegations of the answer, and alleged that, in the year 1899, defendant commenced an action for divorce upon the ground of abandonment prior to that time; that the action was tried and, upon the evidence, dismissed by the court, and that respondent ought now to be estopped from setting up as a ground of divorce a cause accruing prior to that decree. Upon issues substantially as stated above, the cause came on for trial on the 18th day of May, 1904. On the next day, at the conclusion of the evidence, the court announced that there was no sufficient evidence to support the allegations of adultery in the complaint, and that the prayer of the complaint would therefore be denied. The court at that time also announced that the allegations of the cross-complaint were sustained, and that the prayer thereof would be granted. The findings and decree, however, were not signed until December 4, 1904, at which time full findings and a decree

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were signed and entered in favor of respondent. This appeal is prosecuted from that decree.

We have carefully examined all the evidence in the record, and are satisfied that what little evidence there is on the part of the plaintiff as to the adultery of the respondent is fully met and overcome by the evidence on her behalf. The finding of the lower court is the only one which could have been justly made upon that issue. Upon the question of abandonment, the evidence conclusively shows that the plaintiff first left the respondent in May, 1896, and went to Alaska. At that time he transferred all his property to his wife, subject to his debts. She was apparently willing that he should go to Alaska, and acquiesced therein. He returned in the fall of the same year, and remained at home until the spring of 1898, when he again went to Alaska. After he had been gone about a year, respondent brought an action in the superior court of King county for divorce on the ground of abandonment. She obtained service of the summons by publication. Her husband made no appearance, having received no actual notice, but the prosecuting attorney of King county appeared on behalf of the state and, upon a hearing, the action was dismissed. In the fall of 1900 the plaintiff again returned to the state of Washington, but not to his home. He visited his home but once or twice during the next four years, and refused to live with his family, though requested so to do, and made no provision for any of them, and in 1904 he brought this action. These facts we think make a clear case of abandonment of respondent and the children by the plaintiff after the year 1900. The finding of the court in this respect is fully justified.

Appellant contends that, because the trial court awarded all the property to the respondent, such award was not a "just and equitable disposition" thereof. At the time the plaintiff first went to Alaska in 1896, he turned over all his property to his wife. This property consisted of about two hundred and forty-five acres of land, most of which

was fit only for pasture. There were, also, about forty-two head of cows, some few horses, and farming implements. All this property was leased for a term of three years, at the monthly rental of \$115, with a small garden and house reserved to the respondent. It is not definitely shown by the evidence what the value of the property was at that time, but it is apparently conceded that it was worth about \$10,000, and that the debts against it amounted to more than \$7,500. Respondent testified that the property was in poor condition and depreciating in value, and that they were unable to pay their debts or the interest, and that the plaintiff desired at that time to abandon the property to the debts, and this was not disputed by the plaintiff. Respondent collected very little from the lease, and had trouble with the lessees. Many of the cattle died, or were killed by officers because of an infectious disease. The rest were sold for the purpose of paying debts. Respondent, after eight years of toil and hardship, unassisted by her husband, succeeded in saving the property from foreclosure, and in reducing the debts to about \$4,200 at the time of the trial, and in the meantime provided as best she could for herself and minor children, with no assistance from her husband. In view of these facts, and of the fact that she was awarded the care and custody of the minor children, it appears just that she should have all the property remaining for their and her support.

There is one other point made on this appeal. After the court had announced what the decree would be, appellant filed a motion for a new trial upon the ground, among others, of "accident and surprise which ordinary prudence could not have guarded against." In support of this motion, affidavits were filed showing, that the son, Peter Western, was a material witness on behalf of his father; that he was with his father almost daily previous to the trial and until within a few days of the same, when he disappeared and all efforts to find him were of no avail. He was afterwards

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located in California where he was detained as a recruit in the United States army. From California he went to the Philippine Islands, as a member of the Fourteenth United States cavalry. No subpoena had been served upon the boy, and no continuance was asked by reason of his absence, and at the close of the case no mention appears to have been made of the fact that the plaintiff relied upon the evidence of the son which could not then be had. But the case appears to have been rested entirely upon the evidence then introduced. Three uncontradicted affidavits were filed on behalf of the respondent, to the effect that the son, Peter, was in the city of Seattle during the trial, and did not leave there for California until the next day after the conclusion of the trial. At any rate, we think ordinary prudence required that a subpoena should have been served upon the witness; or, when it was discovered before the trial that he was absent and his testimony could not be had, a continuance should have been requested upon a showing. These precautions having been omitted, and no mention made of the absence of this witness until after an adverse decision, and the case having been submitted on other evidence, appellant ought not now to be heard to complain.

We have considered this case upon the merits, disregarding the fact that the plaintiff is now dead, because no question is raised upon that point either in the briefs or on the oral argument, and because property interests are involved depending upon the decree.

Finding no error in the record, the judgment is affirmed.

ROOT, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, J. (concurring).—I concur in the result, but think the appeal should have been dismissed. The marriage has been dissolved by death since the appeal was prosecuted, and it is an idle formality to either affirm or reverse the decree of divorce. It also appears that all the property in controversy was the separate property of the wife. The

right of the husband to have a portion of such property awarded to him upon the granting of a divorce is personal to himself and dies with him. It is not subject to his testamentary disposition and will not pass to his heirs or personal representatives by operation of law. The executor, therefore, has no interest in the litigation and should not be permitted to prosecute or continue the appeal.

Crow, J., concurs with RUDKIN, J.

(No. 5364. Decided July 24, 1905.)

D. H. GLASS, *Appellant*, v. W. H. BUTTNER *et al.*,
Respondents.¹

HUSBAND AND WIFE—ACTIONS AGAINST—COMMUNITY PROPERTY—REPLEVIN—DEFAULT OF HUSBAND—EFFECT ON DEFENSE BY WIFE. In replevin brought against a husband and wife, who defend jointly, claiming the property as community personalty, a default judgment against the husband for failure to answer interrogatories, is not binding on the wife, since under Bal. Code, § 4827, she is entitled to defend in her own right upon the issues raised by her answer; and a judgment of dismissal on plaintiff's failure to prove title, is proper.

SAME—WITNESSES—COMPETENCY ON VALUATIONS. In replevin a witness is shown to be competent on the subject of the value of the property when she stated that she knew the cost of the articles and their value.

Appeal from a judgment of the superior court for King county, Hatch, J., entered December 1, 1903, dismissing an action of replevin, upon denying plaintiff's motion for judgment on the record and election to stand thereon. Affirmed.

L. H. Wheeler and T. O. Abbott, for appellant.

Crary & Ogden and Joseph M. Glasgow, for respondents.

¹Reported in 81 Pac. 699.

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MOUNT, C. J.—Appellant brought this action in the lower court to recover certain household goods, alleged to be his property, and wrongfully withheld. When the action was begun, a writ of replevin was issued on the allegations of the complaint, and the sheriff took into his possession a certain portion of the property. Thereafter the respondents, being husband and wife, jointly answered the complaint, and denied all the allegations thereof, and alleged that they were the owners of the goods. Subsequently the appellant propounded certain interrogatories to be answered by each of the respondents. W. H. Buttner failed to answer the interrogatories, by reason of the fact that he was absent from the state. Mrs. Buttner answered the interrogatories propounded to her, which interrogatories were substantially the same as the ones propounded to her husband. The appellant, upon the failure of W. H. Buttner to answer the interrogatories, moved for a judgment against him for failure to answer within the time allowed by law. This motion was granted, and a judgment entered against the said W. H. Buttner for the possession of the goods.

Thereafter the case came on for trial upon the issues made by the complaint and the answer of Mrs. Buttner. The appellant objected to any other proceedings in the case, upon the ground that the judgment rendered against the husband disposed of the questions in litigation, and moved the court to dismiss the action as to Mrs. Buttner. The court overruled the objection and denied the motion, upon the ground that the order and judgment entered against the husband, who was a codefendant, was an interlocutory order and not final. Appellant thereupon announced that he would stand upon his motion, and the court ordered judgment in favor of the respondent Mrs. Buttner, for the return of the goods or their value. Subsequently, upon a hearing as to the value of the goods, the court entered a judgment in favor of the respondent Mrs. Buttner, for \$470, which was found to be the value of the goods taken by the appellant.

Plaintiff appeals, and contends that the judgment entered against W. H. Buttner was conclusive of the case, because it was admitted that the property was community property, and therefore Mrs. Buttner was not a necessary party.

It is true that Bal. Code, § 4490, gives the husband the management and control of the community personal property, with a like power of disposition as he has of his separate personal property. But the appellant was not content to sue the husband alone for the possession of the property. He joined both the husband and wife, and alleged that both wrongfully withheld the possession thereof from the plaintiff. The defendants answered jointly, and denied that the property belonged to the plaintiff, and denied that he was entitled to the possession thereof. The answer of the husband was stricken because he failed to answer certain interrogatories within time. He was defaulted and judgment taken against him. But the answer of the wife still stood, denying the allegations of the complaint, and the case was completely at issue as to her. If her answer was true, she had a community interest in the property and none of it belonged to the plaintiff and he had no right to its possession. The statute provides, at Bal. Code, § 4827, that,

"If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in all cases in which she is interested, whether she is sued with her husband or not."

We have no doubt that, under this last clause, the wife was authorized to defend in this case, and being so authorized, it became necessary for the plaintiff to prove his ownership of the property and that it was wrongfully withheld from him. Having stood upon his motion to dismiss and failing to make proof of his complaint, the court properly directed judgment against him. The judgment against the husband was no more than a default judgment, and was not final under the circumstances.

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Syllabus.

It is next contended that, upon the trial on the question of the value of the property, the only witness called showed that she was not competent to testify as to the values. We find, however that the witness stated that she knew the cost of the articles, and that she knew the value. Under these circumstances, she was certainly a competent witness.

There is no error in the record, and the judgment is affirmed.

RUDKIN, HADLEY, CROW, and ROOT, JJ., concur.

FULLERTON, J., took no part.

(No. 5569. Decided July 24, 1905.)

GLOBE NAVIGATION COMPANY, LIMITED, *Respondent*,
v. MARYLAND CASUALTY COMPANY, *Appellant*.¹

INDEMNITY—COST OF DEFENDING SUIT—LIABILITY UPON ONE OF SEVERAL CAUSES. Where an indemnity company was required by its bond to defend actions for negligence at its own expense, and made defense to an action for negligence, in which was joined, also, a right of action upon a maritime contract for medical attendance, it is liable for all the costs and expense incurred, where the record falls to show what amount was expended to establish the defense to the cause of action upon the maritime contract.

ESTOPPEL—INDEMNITY—BONDS—INDEMNITY AGAINST PERSONAL INJURIES FROM NEGLIGENCE—RECOVERY ON MARITIME CONTRACT—SURETY'S DEFENSE OF SUIT—DISMISSAL OF APPEAL WITH PROMISE TO PAY JUDGMENT. An indemnity company which, in defending an action for a loss, requests the dismissal of the appeal and promises to pay the judgment, is estopped to assert that it did not know the true nature of the claim and is not liable for the amount of the judgment, where it appears that, pursuant to its bond, it undertook the defense through attorneys selected by it, upon representations of the defendant, made in good faith, that the action was to recover for negligence in the operation of a ship, covered by the bond, although a right of action upon a maritime contract not covered by the bond was included, upon which judgment was entered, the claim for negligence being defeated.

¹Reported in 81 Pac. 326.

ESTOPPEL—INTENT. A design to mislead is not necessary to create an estoppel, where the conduct is such as to induce a reasonable man to act upon it, and the defendant was warranted in assuming that the unconditional order to dismiss the appeal was advisedly made.

SAME—EQUITY. It cannot be urged to defeat the estoppel that the parties stood upon an equal footing, since the duty of making the defense devolved upon the indemnity company.

SAME—KNOWLEDGE OF FACTS—NEGLIGENCE. In such a case, the estoppel is not defeated by reason of the fact that the company did not have full knowledge of the facts respecting the judgment, which was entered in Hawaii, where it had a copy of the libel and was in communication by means of which the fact could have been ascertained; since it was reasonably under obligations to ascertain the facts, and was more than ordinarily negligent in ordering the dismissal without doing so; and since it is bound by the knowledge of the attorneys, who only nominally represented the defendant.

SAME—PREJUDICE TO EFFECT ESTOPPEL. An abandonment of the right of appeal is presumed to be prejudicial, hence the estoppel was not without prejudice from the fact that the judgment was without error and would have been affirmed; since that fact cannot be demonstrated, and evidence to prove it is inadmissible.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 29, 1904, upon findings in favor of the plaintiff, after a trial before the court, a jury being waived, in an action upon an indemnity bond. Affirmed

Graves, Palmer, Brown & Murphy, for appellant. There can be no estoppel where the party did not have full knowledge of the facts, unless its appearance was the result of gross negligence. *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452; 11 Am. & Eng. Ency. Law (2d ed.), 433; 2 Herman, Estoppel & Res Judicata, p. 108, § 957; *Weaver v. Peasley*, 163 Ill. 251, 45 N. E. 119, 54 Am. St. 469; *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784; *Crabtree v. Bank of Winchester*, 108 Tenn. 483, 67 S. W. 797; *Baldwin v. German Ins. Co.*, 113 Iowa 314, 85 N. W. 26, 86 Am. St. 375; *Smith v. Sprague*, 119 Mich. 148, 77 N. W. 689, 75 Am. St. 384; *Kirchman v. Standard Coal*

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Co., 112 Iowa 668, 84 N. W. 939, 52 L. R. A. 318; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927; *Nash v. Baker*, 40 Neb. 294, 58 N. W. 706; *Parkey v. Ramsey*, 111 Tenn. 302, 76 S. W. 812; *Bennecke v. Connecticut Mut. Life Ins. Co.*, 105 U. S. 990, 26 L. Ed. 355. The mere loss of a right to appeal when the judgment below is not erroneous, is without prejudice, and will not work an estoppel. *Hughes v. New York Life Ins. Co.*, *supra*; *Getchell etc. Lum. Mfg. Co. v. Employers' Liability Assur. Corp.*, 117 Iowa 180, 90 N. W. 616, 62 L. R. A. 617; *Sioux Valley State Bank v. Kellogg*, 81 Iowa 124, 46 N. W. 859; *Brigham Young Trust Co. v. Wagener*, 12 Utah 1, 40 Pac. 764; *McCarthy v. Mutual Relief Ass'n*, 81 Cal. 584, 22 Pac. 933; *Warder v. Baker*, 54 Wis. 49, 11 N. W. 342; *Frei v. McMurdo*, 101 Wis. 423, 77 N. W. 915; *Smith v. Yager*, 85 Iowa 706, 50 N. W. 224.

H. R. Clise, for respondent.

HADLEY, J.—This is a suit upon an indemnity bond. The plaintiff is the owner of vessels plying the waters of the Pacific Ocean. Among vessels so owned and operated, is a certain schooner, called the "Willis A. Holden." The defendant, for a valuable consideration, executed and delivered to plaintiff its certain policy of indemnity, whereby it agreed to indemnify the plaintiff against loss for damages on account of bodily injuries accidentally suffered by any employee of plaintiff while on duty on or about its vessels, caused by the negligence of the assured, and resulting from the operation of its vessels. The schooner above mentioned was engaged in a voyage from Newcastle, in New South Wales, to the Pacific coast of the United States, by one or more ports in the territory of Hawaii, and on board of said vessel was a certain seaman named "Donovan," who was, by the captain of said schooner, regularly employed as second mate during said voyage. While in the performance

of his duties, on or about September 24, 1903, he met with an accident on board the schooner, whereby he suffered certain injuries. On account of said injuries said Donovan, on or about October 23, 1903, in the district court of the United States for the district of Hawaii, caused a certain libel and citation to issue out of said court against said schooner, claiming damages in the sum of \$10,000. The schooner was, by the marshal of said district, seized and detained until such time as it was released by reason of the fact that the master, in behalf of this plaintiff, gave bond in the sum of \$10,000 with the United States Fidelity & Guaranty Company as surety.

The complaint avers that, upon the seizure of the schooner, the plaintiff advised the defendant thereof, and that, at the request of defendant, plaintiff procured said bond for release, for which defendant agreed to pay; that plaintiff sent to defendant copies of the libel and proceedings in said action, and at its request employed attorneys to defend the libel, and caused an answer to be filed, denying the liability of this plaintiff for any damages whatsoever in the premises; that plaintiff took such other steps as were requested and advised by the defendant, the latter at all times agreeing to bear the expense of said defense, and to pay all charges incurred therein; that thereafter such proceedings were had in said action that said Donovan obtained a judgment against this plaintiff in the sum of \$800; that, upon the entry of said judgment, the plaintiff at once advised the defendant thereof, and the latter instructed that an appeal should be taken to the proper court; whereupon the plaintiff took the necessary steps and incurred the necessary expense to perfect said appeal; that thereafter the defendant instructed the plaintiff to abandon the appeal, and then agreed with plaintiff to pay the said judgment; that the plaintiff, relying upon said instruction and promise, instructed the attorneys in charge of the defense in the action to abandon the appeal, and that the same was accordingly done; that thereafter

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the defendant, without cause and unwarrantedly, refused to pay the judgment, and still so refuses; that plaintiff was compelled to pay the judgment, amounting with costs to \$881.45, and that plaintiff also necessarily incurred other expense in the defense of the action, including witness fees, attorney's fees, costs of appeal, and other costs, in the sum of \$675.54. Judgment is demanded for the total sum of \$1,556.99.

The defendant answered that the said United States district court rendered a decision in said cause wherein it found that the owner of the schooner, the plaintiff herein, and its agents in control thereof, were not guilty of any negligence in the operation of the vessel rendering the owner liable to said Donovan; but that the court further found that the owner failed to provide suitable medical assistance for said seaman after his injury, and that, for this reason only, it caused the said judgment to be rendered against the schooner and her tackle; that the obligation upon which the judgment was based was one growing out of the implied maritime contract of employment, and was not on account of any damages occasioned by the negligent operation of the vessel, which subject was alone covered by the policy of indemnity. The answer further avers, that all of the directions and requests made by the defendant to the plaintiff with regard to the bond for releasing the schooner, and as to prosecuting a defense, were made solely upon the representations made by plaintiff to defendant that the former was being sued on account of damages alleged to have been occasioned by the negligent acts of those in charge of the schooner, and connected with its operation; that all directions given with regard to taking an appeal, and making a settlement after judgment, were given solely by reason of information from the plaintiff to the foregoing effect; that, as soon as the defendant ascertained that the judgment was given solely on account of the violation by plaintiff of its maritime contract to furnish Donovan with suitable medical

attendance, it informed plaintiff that it would neither pay the judgment nor be in any way responsible by reason thereof; that, if the plaintiff had informed defendant at the time of the rendition of the judgment of the true nature thereof, it would have disclaimed any liability, and would neither have said nor done anything regarding an appeal, a settlement, or other disposition of the case.

The plaintiff replied that, because of the matters alleged in the complaint, the defendant is estopped from setting up or offering in evidence any of the matters set up in the affirmative defense. It was stipulated that the cause should be tried before the court without a jury, and upon an agreed statement of facts. It was so tried, and the court made findings of facts and conclusions of law and entered judgment in favor of the plaintiff for the full sum demanded. The defendant has appealed.

There are no exceptions to the findings of facts, and the errors assigned relate wholly to the court's conclusion from the facts that appellant is estopped to deny its liability. The court found that the libel filed in said district court was based upon an alleged claim for damages growing out of the negligent operation of the vessel, and also from failure to supply the libellant with proper surgical treatment; that both appellant and respondent had in their possession copies of the libel, and both knew that the libellant claimed damages for negligence of operation and also for breach of the maritime contract; that, under the libel, being in part for personal injuries accidentally suffered through alleged negligence, the appellant was obligated by its policy of indemnity to defend the action. The facts with regard to the seizure of the vessel, and the employment of counsel at appellant's request to defend against the libel, are found substantially as alleged in the complaint, and as above set forth. The nature of the decision and judgment rendered by the admiralty court are found to have been as alleged in the answer and set out above. The facts concerning appellant's in-

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structions to the respondent to appeal from the judgment, to thereafter withdraw the appeal, accompanied with the promise by appellant to pay the judgment, the subsequent refusal to pay, and the expense incident to the defense and appeal, are all found as alleged in the complaint and as above stated. It is found that the attorneys for the defense in the libel suit, while nominally representing this respondent, were, in truth and in fact, defending said libel as the attorneys and agents for this appellant. It is further found that the respondent has at all times acted in good faith in giving to appellant all information in its possession pertaining to said action in Hawaii, and that neither party to this action, save by the knowledge possessed by the attorneys in Hawaii, knew upon what ground alleged in the libel the said district court had given judgment; but that, notwithstanding this, the appellant instructed the respondent to abandon the appeal, and stated without qualification or condition that it would pay the judgment.

Appellant admits that it was under the obligation to defend against the libel, as far as the same had to do with negligence in the navigation of the schooner, and that it was liable for any damages that might be recovered as the consequence of such neglect. It admits its liability for at least a portion of the expense of making the defense, but argues that it is not liable for the whole thereof, for the reason that, under its policy of indemnity, it was not obligated to pay damages that might be recovered under one ground alleged in the libel, and which the defense necessarily resisted. The defense was, however, necessary for appellant's own protection. Its contract of indemnity required that it should defend the action at its own expense, and the court found that the amount was properly and necessarily expended in the defense and at appellant's request. The defense may have incidentally included a ground that appellant was not obliged to urge, but the record fails to disclose that the

amount expended was not necessary to establish the defense which appellant was bound to make. Without considering at this time the items of expense incurred after judgment by way of appeal and otherwise, we think appellant is liable under its contract of indemnity for the remaining items, they having been incurred in the defense of the action.

Referring now to the principal contention in the case which concerns appellant's liability for the amount of the Hawaiian judgment, it appears that the parties themselves have stipulated that both acted in good faith, by which it is understood that neither one attempted to deceive the other. It is also established that respondent withdrew its appeal and paid the judgment at appellant's request, relying upon the promise of the latter to reimburse it, and that otherwise the appeal would have been prosecuted. Appellant contends that it acted in the premises without actual knowledge of the true nature of the judgment, and under the belief that it was such a judgment as would establish appellant's liability to respondent. It argues that all the information it possessed came to it from respondent, and that although the latter did not wilfully deceive it, yet inasmuch as respondent was without knowledge of the true nature of the judgment, it failed to advise appellant thereof, but that it was the duty of the former to so advise the latter. It is therefore established that respondent made no attempt to mislead appellant.

It is also a fact that appellant was obligated to defend the action at its own expense, and that it did do so. It therefore became its duty to know the result of the defense it had prosecuted. It had a copy of the libel, and knew that a judgment was sought for breach of the maritime contract as well as upon the other ground. We have also seen that the court specifically found that the attorneys who conducted the defense were the attorneys and agents of appellant. The knowledge of the attorneys, therefore, became the knowledge of appellant, and the latter must be bound by it, especially in the absence of fraud or attempt on respondent's part to

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mislead. The correspondence concerning the matter was conducted by cable and mail between Honolulu and Seattle, and between agents of the respective parties in Seattle, together with communications sent from Seattle to appellant's home office in Baltimore. No reason appears why appellant did not seek information as to the true nature of the judgment through the same medium of communication, which it is manifest it might have done, either from Seattle or Baltimore. Furthermore, it does not appear that respondent knew, at the time it received instructions to withdraw the appeal, that appellant had not availed itself of such means of full information. The instruction was unconditional that the appeal should be abandoned, accompanied with an unconditional promise to pay the judgment. Under all the circumstances it would seem that respondent was justified in assuming that appellant had fully advised itself as to its liability, and that being satisfied it preferred to pay the judgment rather than continue the litigation.

Appellant argues that, since it acted under an honest mistake, without full knowledge of the facts, there can therefore be no estoppel. Many authorities are cited to the effect that estoppel must be based upon full knowledge of the facts on the part of the party to be estopped. What we have said indicates our view that, under all the circumstances, appellant was legally chargeable with knowledge of the true facts. It is also an element of the principle urged by appellant that ignorance of the facts must not result from gross or inexcusable negligence. Appellant cites and quotes the following:

"It may be stated, as a general rule, that the representation or concealment relied on to sustain an estoppel must have been made with full knowledge of the facts by the party to be estopped, unless his ignorance was the result of gross negligence or otherwise involves gross culpability. . . ."

11 Am. & Eng. Ency. Law (2d ed.), 433.

Under the above stated rule, and in view of the circum-

stances, it is manifest that appellant was under the reasonable obligation to ascertain the facts, and that it could reasonably have learned them from the attorneys who conducted the very defense it had directed. When it failed to possess itself of the knowledge held by its own attorneys, and yet assumed to instruct respondent, knowing that the latter relied thereon, it was certainly neglectful in more than an ordinary degree.

“ ‘Negligence’ has been defined to be ‘the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.’ It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.” *The Nitro-Glycerine Case*, 15 Wall. 524.

It is said that appellant had no intention to deceive or mislead respondent. But such an intent is not a necessary attendant of estoppel. The conduct creating the estoppel may be without such intention, if it is such as to induce a reasonable man to act upon it. 11 Am. & Eng. Ency. Law (2d ed.), 431. Decisions from many states are cited by the textwriter in support of the above proposition.

“It is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead and actually did mislead the defendants while acting in good faith, and with reasonable care and diligence, and that thereby they might be placed in a position which would compel them to pay a demand which they had every reason to expect was cancelled and discharged.” *Blair v. Wait*, 69 N. Y. 113.

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See, also, *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Continental Nat. Bank v. National Bank*, 50 N. Y. 575; *Wallerich v. Smith*, 97 Iowa 308, 66 N. W. 184; *Patterson v. Hitchcock*, 3 Colo. 533; *Sullivan v. Colby*, 71 Fed. 460; *Morgan v. Railroad Co.*, 96 U. S. 716; *Swain v. Seamens*, 9 Wall. 254.

It is further argued that the parties stood upon equal footing, that they possessed equal knowledge as to the facts, and that in such case estoppel does not arise. It is true respondent hurriedly employed attorneys in Honolulu to protect the vessel against the libel soon after it was seized. But appellant directed that the same attorneys should be employed in its behalf to conduct the defense, the burden of which it thereafter assumed. From that time, as the court found, while the attorneys nominally represented respondent, yet they actually represented appellant. Under such circumstances we think it should not be said that the parties were equally chargeable with knowledge. The duty of making the defense was cast upon appellant. It undertook the defense through attorneys it deliberately selected. It therefore became its duty to be advised as to the full result. Respondent was not under the immediate duty to know the result as to appellant's liability, since the latter by its contract of indemnity had agreed to prosecute the defense. If the result established that appellant was not liable, then it should have been careful to so inform respondent before it permitted the latter to act under a misapprehension.

It is insisted that estoppel does not arise unless it is shown that respondent has been actually prejudiced, and that it does not appear that the judgment of the Hawaiian court was wrong, and would have been reversed on appeal. That is a matter this court cannot determine. This is not the reviewing court, and the full record of the trial is not here, so that we may even properly form an opinion as to whether there was reversible error. Respondent offers in this court

both argument and authority in support of its contention that it would have been able to secure a reversal of the judgment, but as that question is not for us, we have not examined it. It is said by appellant that the presumption must be that the judgment was correct, and that respondent has not even alleged to the contrary in its complaint in this action. It may be true that such a presumption prevails as a general legal proposition, but the same may be said as to any judgment from which an appeal has been taken, and yet the right of appeal is a valuable right, and when taken is, in itself, a direct attack upon the judgment as having been erroneously entered. It is fully shown by this complaint that the initiatory steps for an appeal were duly taken. A statutory right of appeal is an absolute one and does not depend on the merits of the cause below. 2 Ency. Plead. & Prac., 21; *McCreary v. Rogers*, 35 Ark. 298; *Hewlett v. Shaw*, 9 Mich. 345; *Ware, Register v. McDonald*, 62 Ala. 81; *State ex rel. Boutte etc. v. Judge etc.*, 28 La. Ann. 547.

The respondent therefore had the absolute right to have the cause reviewed on appeal. It was induced to abandon that right by the conduct of appellant, and the latter should not now be heard to say that respondent was not prejudiced because of mere absence of a positive demonstration that it would have secured a reversal on appeal. No one except the Infinite Mind can determine that question to a certainty at this time. Not even the court that would have reviewed the case can now know whether in its view reversible error would have appeared or not. But the certain fact does appear that, by reason of appellant's conduct, respondent did not have the benefit of the wisdom and experience of the learned judges of the appellate tribunal, the United States circuit court of appeals. We therefore think appellant is now estopped to deny its liability to pay as it promised, which included both the amount of the judgment and the subsequently incurred costs. Its liability upon the first branch

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of the case discussed, viz., for the costs of the former defense, having been determined, the judgment is in all things affirmed.

MOUNT, C. J., RUDKIN, FULLETON, and CROW, JJ., concur.

Root, J., being disqualified, took no part.

(No. 5538. Decided July 24, 1905.)

GUSSIE EUPHRAT, *Respondent*, v. EDITH MORRISON,
Appellant.¹

CHattel Mortgages—Foreclosure—Receivers—Appointment—Evidence—Sufficiency of Showing. In an action for the foreclosure of a chattel mortgage upon furniture, including a leasehold interest in a hotel, a receiver *pendente lite* is authorized by statute, and is properly granted, where it appears that the security is inadequate, the mortgagor insolvent, and the leasehold in danger of forfeiture through the mortgagor's refusal to pay the rent, and where the mortgagor refuses to apply rents received by him on the mortgage debt, admits that there is no defense on the merits, and manifests a disposition to delay the proceedings.

Appeal from an order of the superior court for King county, Bell, J., entered September 14, 1904, appointing a receiver *pendente lite* upon the application of the plaintiff, after a hearing upon affidavits, in an action to foreclose a chattel mortgage. Affirmed.

Byers & Byers, for appellant.

Harrison Bostwick, for respondent.

RUDKIN, J.—This is an appeal from an order appointing a receiver *pendente lite*, in an action to foreclose a chattel mortgage. On the 4th day of March, 1904, the appellant mortgaged to the respondent all the furniture and household effects contained on the third and fourth floors of the

¹Reported in 81 Pac. 695.

hotel Western, and also the leasehold interest in the premises occupied by the mortgagor, to secure the payment of \$1,230, in monthly installments of \$100 each, payable on the 4th day of each and every month, commencing April 4, 1904, with interest at the rate of twelve per cent per annum. The mortgage contained a provision that the whole sum should become due and payable on default in the payment of any installment; and the installments due on the 4th day of April, May, June, July, and August were due and unpaid at the time of the commencement of this action. There was a prior mortgage on the same property in favor of one George O'Reilley, to secure the rental on the third and fourth floors of said hotel Western, at the rate of \$250 per month, and the rent for the months of June, July, and August, amounting to \$750, was due and unpaid at the time of the commencement of this action. The respondent, before commencing this action, attempted to foreclose her mortgage by notice without action, under the statute, but the proceedings were removed into the superior court. It further appears that O'Reilley has commenced proceedings to recover possession of the third and fourth floors of the hotel Western, the leasehold interest in which was covered by the mortgage. The complaint further avers that the appellant is intentionally and purposely avoiding the payment of the respondent's mortgage, and of the rent accumulating on the said rooms, and is converting the money which she receives in the conduct and operation of said rooms to her own use, thereby cheating and defrauding respondent out of the money due upon said notes and mortgage.

In opposition to the appointment of a receiver, the appellant cites and relies on *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715, and *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash. 579, 56 Pac. 370. It was held in these cases that the act of 1854, which provided that a receiver might be appointed in an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when-

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ever such property was insufficient to discharge the debt, to secure the application of the rents and profits accruing before sale could be had, was repealed by implication by later statutes, which provide that a mortgage shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the property without foreclosure and sale, and giving to the mortgagor the right of possession until after foreclosure and sale.

We do not understand that this application is based on that statute. Provisions of the statute which are not repealed are to the effect that a receiver may be appointed in all actions, where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured; in an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; and in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

From the showing made in support of the application for the appointment of a receiver, it satisfactorily appears that the mortgage security is wholly inadequate, that the mortgagor, who is personally liable for the mortgage debt, is hopelessly insolvent, and that the mortgage security is impaired, or endangered by the forfeiture of the leasehold interest included within the mortgage, by reason of the wrongful refusal of the mortgagor to pay the rent. In addition to this, while the appellant denies each and every allegation of the complaint in her verified answer, she admits, in her affidavit filed in opposition to the appointment of a receiver, the execution of the notes and mortgage in suit and the default in the payments. It is therefore apparent that she has no defense to the action on the merits, and the entire record manifests a disposition on her part to delay the foreclosure as long as possible, by dilatory proceed-

ings, in order that she may appropriate to her own use the proceeds of the business in which the mortgaged property is used, regardless of the effect upon the mortgagee or the mortgage security. The foregoing facts are a sufficient warrant for the appointment of a receiver, under all the authorities. High, Receivers, § 666; 23 Am. & Eng. Ency. Law (2d ed.), 1027, and cases cited.

The order appointing the receiver is therefore affirmed.

MOUNT, C. J., CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

(No. 5600. Decided July 24, 1905.)

RUSSELL T. NOYES *et al.*, Respondents, v. JAMES A. DOUGLAS, Appellant.¹

ADVERSE POSSESSION—BOUNDARIES—MISTAKE—CLAIM OF RIGHT. The possession of land, inclosed through a mistake as to the location of the boundary line, is shown not to have been adverse or under claim of right, where the owner of city lots, after eight years possession, had the lines surveyed before building and took possession of, improved and claimed his own lots as located by such survey.

SAME—ABANDONMENT OF POSSESSION. An abandonment of possession is shown, where the owner of city lots, after a survey of the boundaries, removed all improvements from a strip of the adjoining lots that he had inclosed by mistake, and took possession of his own lots according to the survey and, for two years before the statute had run, the strip in question remained uninclosed and with improvements too insignificant to challenge attention to an adverse claim.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 22, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

Douglas, Lane & Douglas and *Richard Saxe Jones*, for appellant.

Benson, Hall & Higgins, for respondents.

¹Reported in 81 Pac. 724.

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Opinion Per RUDKIN, J.

RUDKIN, J.—On the 17th day of November, 1891, the plaintiffs acquired by purchase lots six and seven, of block one, of Wirth's addition to the city of Seattle. Soon after their purchase, they located the lots upon the ground, took possession, cleared and fenced them, and planted them to fruit trees, grass and shrubbery. They continued thus to occupy and use the premises until some time in the year 1900. In the latter year the plaintiffs, contemplating the construction of a new house, employed one George F. Cotterill, a civil engineer, to make a survey of the lots and mark the boundaries. By this survey the lots were located twenty-one feet east, and three feet south, of the original location—that is, the original location overlapped twenty-one feet on lots four and five to the west, and three feet on lot eight to the north. The plaintiffs thereupon graded lots six and seven and constructed their house thereon, with reference to the Cotterill survey, and removed the trees and shrubs and all improvements, except the grass, from the twenty-one foot strip formerly occupied. Some time in the year 1902 a small chicken house and yard, which had theretofore been maintained on lot 8, was removed to the overlap on lot 4, and extended about seven feet beyond the overlap.

This action was brought by the plaintiffs against the defendant, as record owner of lots four and five, to quiet title to the twenty-one foot strip above described, the plaintiffs claiming lots six and seven by virtue of their deed, and the twenty-one foot strip across the east end of lots four and five by adverse possession. The plaintiffs had judgment in accordance with the prayer of their complaint, and the defendant appeals.

The judgment appealed from cannot be sustained, for two reasons: First, because no adverse possession was shown; and second, because there was a substantial abandonment of the premises in controversy within the statutory period. Taking into consideration the conduct of the respondents, and all the surrounding circumstances, it cannot be said

that their possession was adverse. They only had claim or color of title to the two lots; they only paid taxes on the two lots, so far as the record discloses; as soon as they contemplated permanent improvements, they took the precaution to have an accurate survey made by a competent surveyor; they located all their improvements within the limits of the lots as shown by this survey, thus showing conclusively that they at all times claimed title to lots six and seven according to the true boundaries when ascertained. Under what pretense, then, can they claim title to property lying without the boundaries of the two lots? We think these facts bring the case within the decisions of this court in *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071, and *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803, where the rule applicable in such cases is thus stated:

"If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

Furthermore, we think the testimony clearly shows a substantial abandonment of the strip of land in controversy within the statutory period of ten years. As soon as the mistake in the boundary was discovered, the respondents immediately removed all their improvements and everything removable from the disputed tract. Some two years later, they moved a small chicken house and yard from lot 8, not owned by them, and located the same on this tract, but for at least two years before the statute had run its course, this strip was uninclosed and the improvements thereon were insignificant in character and value, and wholly insufficient in law to challenge the attention of the owner or a purchaser to the fact that the premises were held or claimed adversely.

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As said by this court in *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330.

"The whole testimony convinces us that the claimant, when he went there, simply squatted upon the land for present convenience; that he had no color of title or claim of right to it in any sense whatever; that he did not even intend or think of obtaining title to it, by the statute of limitations or in any other way, at the time he settled upon it, or for many years thereafter; that the occupation was purely permissive, by reason of the circumstances which we have above portrayed; and that it was the intention upon the part of these claimants to reap the benefit to which they are not entitled by now claiming an adverse possession for ten years. It is not such strolling, straggling occupancy as is shown by the testimony in this case that constitutes a notice of adverse possession. It is the history of most cities of this country that where lands are lying idle, either from being held by non-residents, or from being tied up in lengthy litigation, that a certain class of people squat upon them and build for present use what are called shacks or shanties, and are frequently not disturbed for many years. And this was exactly the condition of affairs in Spokane in reference to these lands in dispute. It is not conducive to public morals to allow a stranger to take possession of property which is in dispute between two citizens, and claim that it is his because the owner has a controversy over it with some one else. *Even if, under such circumstances, adverse possession could ripen into title by reason of large improvements which would necessarily challenge the attention of the owner as being inconsistent with any other theory than that of ownership on the part of the builder, no such notice is given in this case, where the testimony shows, as do the findings of the court, that the improvements were insignificant in character and value, and were only necessary to the occupancy of these lots as a place of residence.*"

For the foregoing reasons the judgment is reversed, with directions to enter a decree quieting the title of the appellant to the disputed tract as prayed in his answer.

MOUNT, C. J., CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

(No. 5642. Decided July 27, 1905.)

CHARLES LAKE *et al.*, Appellants, v. E. P. CHURCHILL *et al.*,
Respondents.¹

VENDOR AND PURCHASER—FRAUD—RESCISSION BY VENDEE—NEGLECT TO INVESTIGATE. There can be no rescission for false representations of the vendor in representing the length of the lots, that the premises were unincumbered, and that an abstract thereof was brought down to date, where the abstract submitted to the vendees showed on its face that it was about a year from date, and the vendees visited the property and had an opportunity to examine the title, the records showing a mortgage subject to a contract assigned to the vendees.

Appeal from a judgment of the superior court for King county, Richardson, J., entered October 8, 1904, dismissing on the merits, an action for rescission on the ground of fraud, after a trial on the merits before the court without a jury. Affirmed.

J. E. McGrew, for appellants.

W. D. Lambuth and Smith & Cole, for respondents.

PER CURIAM.—This action was brought in equity to rescind the sale of two city lots, on the ground of fraud and misrepresentation. Appellants claimed that they purchased the lots upon the representation that they were one hundred and twenty-five feet in length, while in fact one of them was only one hundred and eight, and the other one hundred and twelve, feet long; that the lots were represented to be free from incumbrances, while in truth they were incumbered by a mortgage of \$1,500, and taxes amounting to \$28.80; that the abstract of title which was shown to appellants was represented to be brought down to March 5, 1904, while in fact it was brought down only to April 22, 1903, at which time the title was clear. At the trial it was shown, by the evidence of the plaintiffs, that they visited the property before the sale and examined it; that the abstract

¹Reported in 81 Pac. 849.

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of title showed upon its face that it was brought down to April 22, 1903; that they examined it, and had an opportunity to examine the condition of the title. The record shows that the mortgage of \$1,500 was subject to a contract which was assigned to appellants. The court thereupon dismissed the action. Plaintiffs appeal.

This case falls squarely within the rule applied to the case of *Hulet v. Achey*, ante, p. 91, 80 Pac. 1105, and must be controlled thereby. The judgment is therefore affirmed.

(No. 5629. Decided July 27, 1905.)

THE VULCAN IRON WORKS, *Respondent*, v. THE BURRELL
CONSTRUCTION COMPANY, *Appellant*.¹

PLEADINGS—VARIANCE—CONTRACTS—PARTIES—ADOPTION OF CONTRACT MADE BY ANOTHER PARTY. In an action upon a contract for the purchase price of castings, alleged to have been sold to the defendant, it is not a variance that the proof showed a contract originally entered into with defendant's president, who afterwards directed the account to be changed, where the goods were consigned to the defendant and part of the correspondence was carried on in its name; since the antecedent negotiations were unessential, and a sale to the defendant was shown.

PLEADING—AMENDMENT—ISSUES RAISED BY DENIALS—CONTRACTS—PARTIES. In an action on contract, an amendment to an answer to show that the defendant was not a party to the contract is not necessary where the issue was raised by denials.

CONTINUANCE—SURPRISE—REFUSAL OF NONSUIT—PLEADINGS—AMENDMENT. The denial of a nonsuit is not such surprise as warrants a continuance or the allowance of amendment to the pleadings.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 3, 1905, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Affirmed.

Graves, Palmer, Brown & Murphy, for appellant.

Benton Embree, for respondent.

¹Reported in 81 Pac. 836.

RUDKIN, J.—Some time prior to the 23d day of July, 1903, the plaintiff in this action offered to furnish certain ironwork, with shafting and other appliances, for the construction of a drawbridge, at the agreed price of \$802, and on the above date this offer was accepted in writing, the acceptance being signed by Alfred W. Burrell. It was later discovered that certain of the castings should be made of steel instead of iron, and that the same could not be furnished at the price agreed upon. Thereupon, on the 2d day of November, 1903, it was orally agreed that the plaintiff should receive, in addition to the \$802 theretofore agreed upon, the difference in price between the cost of iron and steel, which should not, however, exceed four and three-fourths cents per pound, and on said date this offer was accepted in writing. The acceptance was on a letter head of the Burrell Construction Company, but was signed by Alfred W. Burrell. The plaintiff contends that this contract was entered into for and on behalf of the Burrell Construction Company, through Alfred W. Burrell, its president and manager. The defendant, on the other hand, claims that it was the individual contract of Alfred W. Burrell. On November 5, 1903, or three days after the acceptance of the modified offer, and before anything was done under it, the plaintiff received the following communication from A. W. Burrell:

“Seattle, Wash., Nov. 5, 1903.

“Vulcan Iron Works, Seattle, Wash.

“Gentlemen: Please change the account of A. W. Burrell to Burrell Construction Company, and hereafter keep accounts and render bills in that name. Yours very truly, A. W. Burrell.”

During the progress of the work, bills seem to have been rendered to A. W. Burrell and to the Burrell Construction Company. The goods were consigned to the Burrell Construction Company, at San Francisco, and some communications to the plaintiff in regard to the goods were signed by A. W. Burrell, and others by the Burrell Construction Com-

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pany. No question seems to have arisen as to the parties to the contract prior to the commencement of this action.

This action was brought against the Burrell Construction Company, to recover the contract price and the price of certain extras. The case was tried before the court without a jury. The court found that the contract entered into on the 2d day of November, 1903, was between the plaintiff and the Burrell Construction Company, and that said contract was fully performed by the plaintiff, and entered judgment for the contract price, together with the price of certain extras. The defendant appeals from that judgment.

As stated above, the court found that the original contract was between the respondent and the Burrell Construction Company, appellant. Whether the court was of opinion that the original contract was entered into by A. W. Burrell on behalf of the Burrell Construction Company, or that the contract became the obligation of the Burrell Construction Company by reason of the order of November 5, above referred to, and the subsequent conduct of the parties, does not appear. However we might view the contract, considered only with reference to what transpired prior to the 2d day of November, 1903, the evidence sufficiently shows that the contract became the obligation of the Burrell Construction Company by reference to what took place after that date. If the court below was correct in its finding that the contract of November 2, 1903, was the contract of the Burrell Construction Company, there is no foundation for the contention of appellant that there is a variance between the complaint and the proof offered to sustain it.

The appellant contends, however, that the proof shows, at most, that the contract between the respondent and Alfred W. Burrell was afterwards adopted by the respondent and the Burrell Construction Company, and that therefore such variance does exist. Undoubtedly, an allegation that a contract was entered into between a plaintiff and a defendant is

not sustained by proof that the contract was entered into between the defendant and a third person and thereafter assigned to the plaintiff. Such were the cases of *Norris Safe & Lock Co. v. Clark*, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129; *Dennis v. Spencer*, 45 Minn. 250, 47 N. W. 795; *Thompson v. Rathbun*, 18 Ore. 202, 22 Pac. 837, and others cited by the appellant. We do not think that these cases are in point here. This was, in substance and effect, an action to recover the purchase price of goods sold and delivered. The court was justified in its conclusion that the goods were sold by the respondent to the appellant. It only became necessary to refer to the prior contract to fix the amount of the purchase price. There was no assignment of the contract from Alfred W. Burrell to the Burrell Construction Company. The most that can be claimed is that the respondent and the Burrell Construction Company adopted, as their own, a contract theretofore entered into between the respondent and Alfred W. Burrell. We see no reason why the respondent should have set forth in its complaint the antecedent negotiations which led up to the adoption of this contract. If there was a variance at all, which we do not concede, the variance was immaterial, not prejudicial, and should therefore be disregarded.

The appellant further insists that it should have been allowed to amend its answer. The first offer to amend was for the purpose of showing that the Burrell Construction Company was not a party to the contract in suit, and had no interest therein. This issue was already presented by the denials in the answer, and an amendment for that purpose was neither necessary nor proper. Again, at the close of the respondent's case, an application was made for a continuance, on the ground that Mr. Burrell was a commissioner from the state of California to the St. Louis Fair, and it was incumbent on him to leave Seattle that night. Coupled with this was an application to amend the answer, setting up counter-claims aggregating the sum of \$1,641, arising out of the

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failure of respondent to comply with its contract. This application was not based upon the ground of surprise, but, in the language of counsel, "under the views your honor has taken of a nonsuit." The surprise which follows a ruling of the court denying a motion for nonsuit is not such surprise as warrants, or requires, the granting of a continuance, or the allowance of an amendment to the pleadings. Parties are ordinarily bound to anticipate the ruling of the court on motions for nonsuit, especially where the ruling is in accordance with the law. There was no material variance between the allegations of the complaint and the proof offered in their support, there was no error in denying the motion for a continuance, or the application to amend the answer, and, inasmuch as these are the only errors assigned, the judgment must be affirmed, and it is so ordered.

MOUNT, C. J., FULLERTON, HADLEY, and CROW, JJ., concur.

Root, J., having been of counsel, took no part.

(No. 5348. Decided July 27, 1905.)

GERTRUDE STRATTON *et al.*, Respondents, v. C. H. NICHOLS
LUMBER COMPANY *et al.*, Appellants.¹

MASTER AND SERVANT—NEGLIGENCE—INDEMNITY—FACT THAT DEFENDANT CARRIES ACCIDENT INSURANCE—TRIAL—CONDUCT OF ATTORNEY. It is reversible error for counsel to make statements and ask questions in the presence of the jury from which it would be inferred that the defendant in a personal injury case carried casualty insurance, and to make an offer of proof that a witness was an attorney for the casualty company which insured the defendant.

SAME—CONDUCT OF ATTORNEY—STATEMENTS OUTSIDE OF EVIDENCE. It is prejudicial error for counsel, during the examination of witnesses, to continually and notwithstanding repeated objections, interpolate statements of fact to such an extent that the jury might confuse the same with the evidence of the witnesses.

¹Reported in 81 Pac. 831.

39 323
40 200

MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE—CONJECTURE—INJURY FROM SET SCREW. Where a laborer in a mill is killed by reason of coming in contact with a set screw upon a revolving shaft, while executing an order to remove and tie back a belt from a pulley, and no one saw the accident or knew how he happened to come in contact with the set screw, a verdict for the plaintiff must be set aside; since no explanation of the accident can be made except by speculation, surmise, or guess.

SAME. It cannot be argued that it was necessary for him to stand upon the rack in order to reach and remove the belt which was tight, when it appears that the belt was loosened and already removed, and could be reached from below, and was tied on one side before the accident.

SAME—TWO METHODS, ONE SAFE—CONTRIBUTORY NEGLIGENCE. Where a laborer in a mill came in contact with a set screw upon a revolving shaft, while executing an order to remove a belt from a pulley and tie it back, by reason of standing on a nearby rack, and it appears that he might have executed the order without coming near the shaft, by standing upon benches below the belt, which method was perfectly safe, he is guilty of contributory negligence precluding a recovery.

SAME—NEGLIGENCE OF FOREMAN IN STARTING MILL—WARNING. Negligence cannot be predicated on the act of a foreman in starting a mill while an employee was in the act of removing a belt from a pulley, where it appears that a signal for the starting was given and the mill was running two or three minutes before the servant was injured, who therefore had ample notice, and where the belt could have been safely removed while the mill was in motion.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 26, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of a servant caught by a set screw in a revolving shaft. Reversed.

Root, Palmer & Brown and Douglas, Lane & Douglas, for appellants, contended, among other things, that a set screw eight or nine feet above the floor is "protected" as that term is commonly used. *Glassheim v. New York Economical Print. Co.*, 34 N. Y. Supp. 69; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 162 N. Y. 399, 56 N. E. 897; *Powalske v. Cream City Brick Co.*, 110 Wis. 461, 86 N. W.

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Citations of Counsel.

153; *Groff v. Duluth Imperial Mill Co.*, 58 Minn. 333, 59 N. W. 1049; *Byrne v. Nye & Wait Carpet Co.*, 61 N. Y. Supp. 741; *Williams v. Wagner Co.*, 110 Wis. 456, 86 N. W. 157. There was no evidence or information as to how the accident happened. *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118. The plaintiff assumed the risk of injury from a set screw. *Ford v. Mt. Tom Sulphite Pulp Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 70 N. E. 437; *Demers v. Marshall*, 172 Mass. 548, 52 N. E. 1066; *Wabash Paper Co. v. Webb*, 146 Ind. 303, 45 N. E. 474; *Donahue v. Washburn & Moen Mfg. Co.*, 169 Mass. 574, 48 N. E. 842; *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484; *Schroeder v. Michigan Car Co.*, 56 Mich. 132, 22 N. W. 220; *Hale v. Cheney*, 159 Mass. 268, 34 N. E. 255; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367. The improper conduct of counsel and statements outside of the record constituted reversible error. *Fuller Co. v. Darragh*, 101 Ill. App. 664; *Wildrick v. Moore*, 22 N. Y. Supp. 1119; *Roche v. Lewellyn Iron Works Co.*, 140 Cal. 563, 74 Pac. 147; *Manigold v. Black River Traction Co.*, 80 N. Y. Supp. 861; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Tremblay v. Harnden*, 162 Mass. 383, 38 N. E. 972; *Dow v. Weare*, 68 N. H. 345, 44 Atl. 489; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Smith v. Western Union Tel. Co.*, 55 Mo. App. 626; *Schaidler v. Chicago etc. R. Co.*, 102 Wis. 564, 78 N. W. 732; *Louisville etc. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Thompson v. Toledo etc. R. Co.*, 91 Mich. 255, 51 N. W. 995; *Ensor v. Smith*, 57 Mo. App. 584; *Illinois Central R. Co. v. Souders*, 79 Ill. App. 41; *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 19 Am. Rep. 483; *Blum v. Simpson*, 66 Tex. 84, 17 S. W. 402.

John B. Hart and *Robert W. Prigmore*, for respondents.

It was negligence to supply the set screw and fail to protect it, where the appliance could easily be replaced by a safer one. *Crooker v. Pacific Lounge etc. Co.*, 29 Wash. 30, 69 Pac. 359; *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725; *Washington etc. R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Choctaw etc. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Geno v. Fall Mountain Paper Co.*, 68 Vt. 568, 35 Atl. 475; *Homestake Min. Co. v. Fullerton*, 69 Fed. 923; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Austin v. Chicago etc. R. Co.*, 93 Iowa 236, 61 N. W. 849; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. 124; *Nyback v. Champagne Lumber Co.*, 109 Fed. 732; *Craver v. Christian*, 36 Minn. 413, 31 N. W. 457, 1 Am. St. 675; *King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10; *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357, 104 Am. St. 665; *Martin v. California Cent. R. Co.*, 94 Cal. 326, 29 Pac. 645; *Sincere v. Union Compress & Warehouse Co.* (Tex. Civ. App.), 40 S. W. 326; *Louvimore v. Palmer Mfg. Co.*, 60 S. C. 153, 38 S. E. 430; *Bonner v. Pittsburgh Bridge Co.*, 183 Pa. St. 195, 38 Atl. 896; *Kehler v. Schwenk*, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. 777; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. 176; *Troxler v. Southern R. Co.*, 124 N. C. 189, 32 S. E. 550, 70 Am. St. 580, 44 L. R. A. 313; *Greenlee v. Southern R. Co.*, 122 N. C. 977, 30 S. E. 115, 65 Am. St. 734, 41 L. R. A. 399; *Wit-sell v. West Asheville etc. R. Co.*, 120 N. C. 557, 27 S. E. 125. The distance from the floor is no protection. *King v. Ford River Lumber Co.*, *supra*; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 162 N. Y. 399, 56 N. E. 897; *Pullman's Palace-Car Co. v. Harkins*, 55 Fed. 932. It was negligence to change the set screw without giving notice. *Morton v. Moran Bros.*, 30 Wash. 362, 70 Pac. 968; *Craver v. Christian*, 34 Minn. 397, 26 N. W. 8; *Mirick v. Morton*,

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Citations of Counsel.

62 Kan. 870, 64 Pac. 609; *O'Donnell v. Sargent*, 69 Conn. 476, 38 Atl. 216; *Ryan v. Chelsea Paper Mfg. Co.*, 69 Conn. 454, 37 Atl. 1062; *Northwestern Fuel Co. v. Danielson*, 57 Fed. 915; *Cincinnati etc. R. Co. v. Gray*, 101 Fed. 623; *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. 138; *McDougall v. Ashland Sulphite-Fibre Co.*, 97 Wis. 382, 73 N. W. 327; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215. The master may be liable for an injury due to slight forgetfulness or momentary inattention. *Nadau v. White River Lumber Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. 29; *King v. Ford River Lumber Co.*, 93 Mich. 172, 53 N. W. 10; *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799. There is a presumption that the deceased exercised due care, and the burden of proof is upon the defendant to show contributory negligence. *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Rush v. Spokane Falls etc. R. Co.*, 23 Wash. 501, 63 Pac. 500; *Cogdell v. Wilmington etc. R. Co.*, 132 N. C. 852, 44 S. E. 618; *Dalton v. Chicago etc. R. Co.*, 104 Iowa 26, 73 N. W. 349; *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa 328, 60 N. W. 653; *Texas etc. R. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Burns v. Chicago etc. R. Co.*, 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227. The fact that the accident could have happened in one or more ways, does not leave the matter to conjecture; we only enter the field of conjecture in the absence of all proof. *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471; *Rush v. Spokane Falls etc. R. Co.*, *supra*; *Allend v. Spokane Falls etc. R. Co.*, *supra*; *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Conner v. Missouri Pac. R. Co.*, 181 Mo. 397, 81 S. W. 145; *Southern R. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *Powell v. Southern R. Co.*, 125 N. C. 370, 34 S. E. 530; *Indianapolis St. R. Co. v. Bordenchecker* (Ind. App.), 70 N. E. 995; *Portland Gold Min. Co. v. Flaherty*,

111 Fed. 312; *Miller v. Inman*, 40 Ore. 161, 66 Pac. 713. See, also, the following set screw cases especially in point: *Pruke v. South Park Foundry Machine Co.*, 68 Minn. 305, 71 N. W. 276; *Roth v. Northern Pac. Lum. Co.*, 18 Ore. 205, 22 Pac. 842; *Daubert v. Western Meat Co.*, 135 Cal. 144, 67 Pac. 133; *Guinard v. Knapp, Stout & Co.*, 95 Wis. 482, 70 N. W. 671; *Id.*, 90 Wis. 123, 62 N. W. 625, 48 Am. St. 901; *Hawkins v. Johnson*, 105 Ind. 29, 4 N. E. 172, 55 Am. Rep. 169; *Keller v. Gaskell*, 9 Ind. App. 670, 36 N. E. 303; *Id.*, 20 Ind. App. 502, 50 N. E. 363; *Galveston Oil Co. v. Thompson*, 76 Tex. 235, 13 S. W. 60. The mere asking of questions relating to indemnity insurance is not reversible error. *Shoemaker v. Bryant Lumber etc. Co.*, 27 Wash. 637, 68 Pac. 380; *Portland Gold Min. Co. v. Flaherty*, 111 Fed. 312; *Wabash Screen Door Co. v. Black*, 126 Fed. 721; *Marande v. Texas etc. R. Co.*, 124 Fed. 42; *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1, 45 S. W. 99; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079; *Foley v. Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284; *Hedlun v. Holy Terror Min. Co.*, 16 S. D. 261, 92 N. W. 31; *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 South. 268; *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337; *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79; *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510; *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 85 Am. St. 348; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45; *O'Neill Mfg. Co. v. Pruitt*, 110 Ga. 577, 36 S. E. 59; *Shaler v. Broadway Imp. Co.*, 47 N. Y. Supp. 815. There was no misconduct of counsel. *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143; *Chezum v. Parker*, 19 Wash. 645, 54 Pac. 22; *State v. Moody*, 7 Wash. 395, 35 Pac. 132; *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Portland Gold Min. Co. v. Flaherty*, 111 Fed. 312; *Westercamp v. Brooks*, 115 Iowa 106, 88 N.

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W. 372; *Weeks v. Scharer*, 129 Fed. 333; *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346; *Pittsburg etc. R. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. 826; *Greenfield v. Detroit etc. R. Co.*, 133 Mich. 557, 95 N. W. 546.

CROW, J.—This action was brought by respondents, widow and minor son of George Stratton, to recover damages for his death, which occurred while he was working as an employee in the shingle mill of C. H. Nichols Lumber Company, one of the appellants, at Ballard, King county, Washington. From a judgment awarding damages in the sum of \$20,000, this appeal has been taken.

George Stratton, a mill man of twenty years' experience, was employed in appellant's mill as a shingle sawyer, being in charge of a "ten-block" machine. Within six feet of him was another "ten-block" machine operated by one Freeman Jensen, a fellow servant. The mill was a two-story structure, the ten-block machines being located in the upper story and operated by power transmitted by means of certain shafts, belts, and pulleys. In the lower story was the main shaft, which was supported by hangers and cross-trees suspended from the ceiling, said shaft being about three inches in diameter and about nine feet above the floor. On this shaft was a pulley, over and from which an endless leather belt passed to another pulley on a countershaft in the upper room. On the countershaft were two other pulleys, from which belts passed to the machine, transmitting the power by which it was operated. The main shaft when in operation made about six hundred revolutions per minute. On the outside of the hanger from the main pulley, and towards the end of the shaft, a collar was placed, which was held in position by an exposed set screw, also about nine feet above the floor. The belt running from the main shaft pulley to the countershaft pulley was new, and respondents contend was too tight. On the upper floor an idler, or tightener, was provided, be-

ing so arranged as to be thrown against the belt taking up slack, thereby causing friction and operating the ten-block machine. The pulley on the main shaft was forty-two inches in diameter, and the one on the countershaft thirty-two inches in diameter.

The accident causing the death of George Stratton occurred on December 18, 1902, at about eight o'clock A. M. A short time before, Matthew Carey, the foreman of the mill and one of the appellants herein, ordered Mr. Stratton to cut out his ten-block machine until quartering time, which would be about 9:30 o'clock A. M., and respondents contend that Mr. Carey also ordered him to go below and tie back his main belt so as to prevent it from burning by rubbing against the main shaft pulley. The mill was stopped. Stratton threw off the belt, took two pieces of rope, and went below to tie it back. While the mill was stopped, his fellow-servant Jensen took advantage of the opportunity to change the saws on his ten-block machine. Respondents claim that, while Mr. Stratton was tying back the belt, the foreman, Mr. Carey, ordered the mill to start. This is denied by appellants. A signal whistle was given, the mill started, and in about two or three minutes thereafter, an unusual sound being heard below, the mill was stopped, when Stratton's dead body was found on the floor almost under the shaft, hanger, and set screw, while his clothing and one piece of the rope which he had carried were wrapped around the end of the shaft, the collar, and the set screw near the bridge-tree, on the side opposite from the main pulley. One side of the belt had been tied to the hanger or bridge-tree, but the other was not tied back. As above stated, the main shaft was about nine feet from the floor. On the lower floor, and almost under the shaft, were two benches, one being about twenty-four inches in height and the other about twenty-six. Below the main shaft and pulley, suspended from the hangers and cross-trees, probably about six feet from the floor, was a rack constructed of light pieces of timber, used for holding shingle bands. Opposite this

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rack was a window, in the side of the building, with a sill or a cleat nailed across it. When last seen alive Mr. Stratton was up near the shaft with one foot on the band rack and the other on the window sill or cleat, tying back one side of the belt. No one saw him come in contact with the set screw, nor was any one able to tell how he happened to get caught.

Negligence on the part of appellants is claimed by respondents: (1) In that Carey ordered Stratton to go below and tie back the belt, which was not a part of his usual employment; (2) in the use of the unguarded set screw, which is claimed to have been a dangerous device not commonly used, recently placed on the shaft without Stratton's knowledge, without notice to him, and improperly adjusted; (3) in using a belt from the main pulley to the countershaft pulley which was too tight and therefore difficult to remove; (4) in that Carey ordered the mill started while Stratton was tying back the belt. All of these claims are vigorously denied by appellants.

Many assignments of error have been presented, a number of which are sufficient to warrant a reversal; but as we have arrived at a conclusion which necessitates a dismissal of this action, we will not consider them further than to discuss one based upon misconduct of counsel. At the time of empaneling the jury, respondents' attorney persisted in asking each of the jurors on their *voir dire* whether they were connected with any guaranty or casualty insurance company, saying in explanation: "Any kind that insured a mill company against loss; that is, if the mill company was negligent, why then some insurance company paid the damages;" and when counsel for appellants objected, remarked: "You don't mean to say that the Nichols mill company is not insured?" Again, upon cross-examination of one E. B. Palmer, an attorney and one of appellants' witnesses, counsel asked if he was not attorney for the casualty company which insured the mill. An objection being sustained, he then offered to prove by cross-

examination of Mr. Palmer that he was such attorney. Under the authority of *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202, and *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431, this was improper conduct and constituted prejudicial error. Again, under the guise of questions propounded to witnesses, counsel for respondents placed himself in the attitude of making statements of alleged fact, doing so repeatedly, over objection of opposing counsel, so much so in fact that, in making an examination of the record, we ourselves have experienced much difficulty in distinguishing these unsworn statements from evidence given by witnesses. It can be readily seen that a jury might easily get these statements and expressions confused with evidence actually admitted. As one illustration: Counsel for appellants propounded this question to a witness: "Well, now, it is not customary to box shafts that are up over a man's head, is it?" Whereupon counsel for respondents stated: "I object, if your honor please, as incompetent because it is customary to box shafts and protect them wherever they are dangerous, and they are dangerous wherever people have to be." This course of counsel was continuous, being maintained during the entire trial, although constantly objected to by attorney for appellants, and in face of the fact that in nearly every instance such objections were sustained. It is true the trial was bitterly and ably fought on both sides, and in the heat of a strenuous contest counsel may have in part failed to fully realize the course he was pursuing. But such conduct in the presence of a jury is inexcusable, and cannot fail to be highly prejudicial. Were this the only error assigned, we would, in the light of the record, be compelled to reverse the judgment by reason of such misconduct.

At the close of respondents' case, and again at the close of the entire case, appellants challenged the sufficiency of the evidence and moved for judgment. Many points are presented in support of this motion, but we will consider two only.

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(1) Appellants contend that, even though it be conceded negligence has been proven on their part, still there is an utter failure of evidence showing or tending to show that the accident was the proximate result of such negligence. In other words, it is contended that, as no one saw the accident or knew how the deceased happened to come in contact with the set screw, it will not do for the court or the jury to speculate, surmise, or guess as to how the deceased was caught, or the accident happened. In support of this contention appellants cite, *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit county*, 33 Wash. 174, 73 Pac. 1118, which cases we think conclusive on this point. In *Hansen v. Seattle Lumber Co.*, *supra*, this court said:

"In order for the respondent to recover for his injury, it was necessary for him to show not only that the appellant had been guilty of negligence, but that such negligence was the cause of his injury. It is not necessary, of course, that the facts be proven by direct evidence. Circumstantial evidence of the fact is sufficient. But there must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby. . . . But there is no direct evidence as to the cause of the injury, and it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other manner, or in a manner for which the appellant would not be liable."

After making the above statement, this court proceeds to quote with approval from the case of *Patton v. Texas etc. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, language of Mr. Justice Brewer which is especially pertinent here. In *Armstrong v. Cosmopolis*, *supra*, Dunbar, J., uses the following language:

"But while it is true that the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony. There are

many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants."

In addition to the above authorities, the following might be consulted as supporting appellants' proposition: Bailey, *Master's Liability*, p. 503 *et seq.*; *Mountain Copper Co. v. Van Buren*, 123 Fed. 61. Applying the principles above enunciated, we find an utter absence of evidence showing or tending to show how the deceased came in contact with the set screw. There is no question but that he was caught. The last seen of him, however, he was on the opposite side of the hanger from the collar and set screw, with one foot upon the band rack and one on the window sill, tying back the belt.

Ten special interrogatories were propounded to the jury, two of which, with the answers of the jury, read as follows:

"Q. Did he [Stratton] place himself against the set screw or shaft knowingly and intentionally? A. No. Q. Did he come in contact with it accidentally? A. No."

It is contended by appellants that these answers are absolutely inconsistent. On the other hand, respondents contend they are not inconsistent, but are warranted under all the circumstances of the case, and in support of their contention they urge that the interrogatories were unfair; that their submission was a trick upon the part of appellants, seeking to take advantage of the jury; that the jury did all it could in answering them in the negative; that such answers were correct, for the reason that there was no evidence tending to show how the deceased came in contact with the set screw. Either the appellants are correct in their position that the answers are inconsistent, or respondents are correct in saying that the answers given became necessary by reason of the absence of evidence. Upon either theory, no explanation of the accident can be made except by speculation, surmise, or guess, and under the above authorities, this cannot be permitted. We are of the opinion that the answers to these two

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interrogatories are inconsistent with the general verdict, and that said verdict should not be sustained.

(2) Appellants also contend that, in tying back the belt, the deceased placed himself in a dangerous position, whereas he could have done it from another position which was perfectly safe and free from danger, and urge that where a servant has an opportunity of doing work in two ways, one safe and the other dangerous, and accepts the dangerous method, he is guilty of contributory negligence and cannot recover even though his master be negligent. In support of this position appellants contend, and we think with much reason, that it was not necessary for the deceased to climb upon the band rack and sill to tie back the belt. It is in evidence that there were two benches under the shaft, twenty-four and twenty-six inches in height, respectively. The shaft was nine feet from the floor, or about seven feet above these benches. The pulley was forty-two inches in diameter, which necessarily brought the belt at least twenty-one inches below the shaft, or about five feet and three inches above the benches; and appellants contend that, instead of climbing upon the band rack, the deceased could have easily stood upon these benches and tied back the belt without coming near, or in contact with, the shaft or set screw; that this method was perfectly safe, and that, had it been adopted, Stratton would have been in no danger whatever whether the machinery was moving or not. We think this contention should be sustained. *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Glassheim v. New York Economical Print. Co.*, 13 Misc. Rep. 174, 34 N. Y. Supp. 69; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 70 N. E. 437.

It is urged, however, by respondents that it was necessary for Stratton to climb up on the band rack to take off the belt, as it was too tight and could not be readily removed from below. The record shows that, before leaving the ten-block machine above, he removed the belt. The upper pulley was thirty-two inches in diameter, and when the belt was re-

moved from said pulley it would have necessarily fallen at least sixteen inches. It could not, therefore, have been too tight. It must have been off of and below the lower pulley when Stratton went downstairs. In any event, he had tied it back to one hanger before he was hurt, and must have had it off the pulley at that time. It appears to be a proposition capable of mathematical demonstration that it was absolutely unnecessary for the deceased to climb upon the band rack to tie back the belt, and that he could have tied it back while standing on the benches.

It is also contended by respondents that the foreman was guilty of negligence in ordering the mill started while Stratton was tying back the belt. There is no evidence that any intention existed of not starting the mill, or that it was not customary for it to be in operation while an employee was tying back a belt. But in any event, it is in evidence that, before the mill was started, a signal was given by two blasts from a steam whistle, and that the mill had been running two or three minutes before the accident occurred. It is self-evident that a person caught upon a shaft revolving at the rate of six hundred revolutions a minute would be thrown off in not to exceed one or two seconds of time. The mill, therefore, must have been running for a considerable time before deceased was caught on the set screw. In any event, he had ample notice of the starting of the mill by the giving of the signal, which could be readily heard where he was working.

We have before us a large model of the mill, introduced in evidence by respondents, which shows the relative positions of the shafts, pulleys, collar, set screws, hangers, band rack, belts, benches, idler, ten-block machine, and, in fact, all appliances in the mill material to a correct understanding of the situation. After a most painstaking and careful examination of all the evidence, aided by the presence of this model, we are unable to see how it can be successfully contended that the deceased was not guilty of contributory neg-

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ligence. The accident was a most lamentable and unfortunate one. The respondents have been deprived of husband and father, and their loss is immeasurable. This, however, is not sufficient reason for awarding damages against the appellants, who are not liable. The courts must administer the law according to its well-established principles.

The judgment of the trial court is reversed, and the cause remanded, with instructions to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, and RUDKIN, JJ., concur.

Root, J., having been of counsel, took no part.

(No. 5582. Decided July 27, 1905.)

J. E. LILLY *et al.*, Respondents, v. LILLY, BOGARDUS & COMPANY, Appellant.¹

APPEAL—REVIEW—FINDINGS—SALES—EVIDENCE. The findings of the trial court establishing a sale will not be disturbed on appeal when supported by the direct testimony of two witnesses and corroborating circumstances, as against the conflicting evidence of one witness.

FRAUDS, STATUTE OF—SALES—PART PAYMENT. A payment and part performance, sufficient to take an oral sale of 100 tons of hay and oats out of the operation of the statute of frauds, is shown, where two witnesses testify positively that, when the contract was made orally with the president of the vendor on its behalf, over \$1,700 in gold dust was delivered to him at Dawson, about \$700 of which was in part payment for the goods, and in response to a telegraphic order, the vendor shipped five tons thereof to Dawson.

COMPROMISE AND SETTLEMENT—ACCEPTANCE OF PART—ACCORD AND SATISFACTION. The acceptance of a check for part of the sum claimed does not amount to an accord and satisfaction where, upon an angry dispute over the amount due, the defendant gave the check under a direction from the plaintiff to pay what it was willing, and they would "scrap" over the balance.

¹Reported in 81 Pac. 852.

SALES—FAILURE TO DELIVER—MEASURE OF DAMAGES—MARKET VALUE AT POINT OF DELIVERY. The measure of damages for the failure of the vendor to deliver hay and oats, sold in Seattle, for shipment to Alaska before the close of navigation, for resale on the Dawson market, is the net profit that could have been realized on the Dawson market, where by reason of the default the vendees were unable to obtain other goods during the current season.

COSTS—JURY FEE—WAIVER OF JURY AFTER PAYMENT. It is proper to tax as costs the advance jury fee paid by the prevailing party prior to a stipulation to waive a jury trial.

Appeal from a judgment of the superior court for King county, Hatch, J., entered September 8, 1904, upon findings in favor of the plaintiffs, after a trial before the court, a jury being waived, in an action on contract. Affirmed.

Allen, Allen & Stratton, for appellant.

John E. Humphries, for respondents.

HADLEY, J.—On the 4th day of September, 1901, J. E. Lilly and Frances Lilly, his sister, were copartners under the firm name of J. E. Lilly & Co., and were engaged in business at Dawson, Yukon territory. As such firm, they bring this action against Lilly, Bogardus & Co., a corporation, organized under the laws of this state, having its principal place of business at Seattle. The complaint avers, that on the date above named the defendant, through its duly authorized agent, Charles H. Lilly, its president, sold to plaintiffs, at Dawson, fifty tons of hay and fifty tons of oats, and, as part of the contract of sale, undertook and agreed orally with plaintiffs to ship the oats and hay from Seattle to the plaintiffs at Dawson; that the defendant further agreed that the directions for said shipment should be immediately sent by telegraph, by its said agent, from Dawson to Seattle; and that the shipments should be made as soon as practicable in the ordinary course of business; also, that it was agreed that the price to be paid should be the prevailing market price of hay and oats in the open market, in Seattle, on the day of the receipt by defendant in Seattle

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of the telegraphic directions regarding the shipments; that said telegraphic instructions were sent to defendant from Dawson, by its said agent, on the 4th day of September, and were received by it on the 11th day of September. Averments are made as to the price of hay and oats in the open market in Seattle on the last named date. It is also averred that, on the 9th day of said month, the plaintiffs paid to defendant the sum of \$1,769.68, and that it was then agreed that the said sum should be applied and used by defendant as follows: \$1,075 was to be applied on an account then owing from plaintiffs to defendant for twenty-five tons of hay and twenty-five tons of oats previously purchased, and the remainder of said payment, amounting to \$694.68, was to be applied and credited as part payment in advance on account of said fifty tons of hay and fifty tons of oats purchased as aforesaid.

It is further alleged that the defendant shipped to the plaintiffs, of the said fifty tons of hay, five tons and no more, which five tons were duly received by plaintiffs under said contract of purchase, and as a part of said shipment of fifty tons of hay and fifty tons of oats; that said hay and oats were purchased by plaintiffs to be sold by them in the Dawson market, which fact was well known by defendant at the time of the purchase; that, on and after the date of said purchase, the only available route for the said shipment was by ocean freight from Seattle to Skagway, thence by the White Pass railroad to White Horse, and from the latter place to Dawson by river steamers; that this route of shipment is usually closed about the 25th of October in each year, all of which facts were well known to the defendant at the time of said sale, and were taken into consideration in making said contract; that it was further known to the defendant that it would be necessary to use reasonable diligence to obtain prompt shipment in order that the same might reach the plaintiffs before the close of shipments by said route, and that, in consideration of the purchase, the

part payment thereon, and the agreement to pay the full purchase price, the defendant agreed to use reasonable diligence in shipping so that plaintiffs could receive the shipment by said route before it was closed. It is alleged that the defendant did not use any diligence, and that it made no effort whatever to make the shipment other than the five tons of hay aforesaid, and that no shipment was made other than as above stated.

Averments are made as to the amount of freight, duty and handling charges the plaintiffs would have been required to pay, if said shipment had been made; also, as to the market value of hay and oats in Dawson at the time the shipment should have arrived there, October 25. It is alleged that, from the time the sale was made, and until after said October 25, the defendant led the plaintiffs to believe that it would fulfill its said contract, and notified them that all orders had been filled and all goods shipped. Damages in the sum of \$4,290, and interest thereon, are demanded.

The answer denies many of the material allegations of the complaint, and affirmatively alleges that the plaintiffs orally requested the defendant, through its president and representative who was at Dawson, to ship to them fifty tons of hay and fifty tons of oats, being the same hay and oats referred to in the complaint; that said representative then and there stated to plaintiffs that he did not know whether it would be possible for defendant to make the shipment, or whether it would be willing to extend to plaintiffs the desired amount of credit; that it was agreed that defendant's said president should, by telegraphic message, request defendant to make the shipment, and that it should have the right to either ship or not ship as it saw fit; that such message was sent, but that the defendant was unable to procure the necessary amount of hay and oats, or the necessary freight space upon vessels for the shipment; also, that it did not desire to extend further credit to plaintiffs. It is also alleged that the agreement relating to the sale was wholly

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oral; that the value of the hay and oats exceeded \$100; that no part of the purchase price was paid; that no goods were delivered; and that the agreement of sale was therefore within the statute of frauds. The answer also contains a plea of accord and satisfaction, and the affirmative defenses are denied by the reply. The cause was tried by the court without a jury, and resulted in a judgment in favor of plaintiffs in the sum of \$2,500. The defendant has appealed.

It is first urged that the court erred in not finding that the order for the one hundred tons was conditional, as alleged in appellant's answer. The court found that the contract of sale was absolute, and without conditions. The record of the evidence is voluminous, including a large amount of oral testimony and a mass of written correspondence. We have laboriously read the statement of facts, and the finding of the court in the above particular is supported by the testimony of the respondents. They are respectively the brother and sister of Charles H. Lilly, the president of appellant corporation, who made the sale in behalf of appellant. Opposed to the testimony of both the respondents is that of their said brother. The court evidently relied upon the testimony of the respondents, which was direct and unequivocal. That of their brother was equally direct at the time of the trial, but from indications appearing in the correspondence that he may not have remembered all the details concerning this sale, it was not necessary that the court should believe that his testimony was intentionally false, but rather that he might have forgotten just what did take place between him and the respondents. The court, after hearing and observing these witnesses during a long and tedious trial, and after considering the correspondence between the parties, reached the conclusion that the respondents' testimony was correct; and we think, under the whole evidence, that we should not be warranted in disturbing the finding.

It is next complained that the court should have found that there was no written memorandum of the sale, no part

delivery of the goods, and no payment made, it being contended that the facts show the contract to have been within the statute of frauds. No specific finding was made as to the first two points above mentioned, but it was expressly found that respondents paid appellant on account of such sale the sum of \$694.99. It is admitted that the respondent firm was not indebted to appellant in any sum when Charles H. Lilly, representing appellant, went to Dawson in August, 1901. It is also admitted that on the 30th day of that month respondents purchased from appellant twenty-five tons of hay and twenty-five tons of oats, and that their indebtedness upon that purchase was all they were owing appellant at the time they made the purchase of the one hundred tons, on September 4. It is not disputed that, on September 9, respondents delivered to their brother, Charles H. Lilly, gold dust of the value of \$1,769.68. The respondents both testified positively that the delivery was made to their brother as the representative of appellant, and that it was then agreed that appellant should credit them by reason of the delivery of the gold dust with the full value thereof, and that it should be applied to the payment in full of the said purchase of August 30, in the sum of about \$1,075, and the balance should be applied upon the indebtedness for the purchase of the one hundred tons. The appellant did afterwards credit respondents with the full value of the ore, as ascertained through the assay office in Seattle. Charles H. Lilly testified that there was no agreement to credit any part of it upon the one-hundred-ton deal. But we think upon this subject, also, that the weight of the evidence sustains the court's finding that a payment was made and received upon that purchase. The court made no finding one way or the other as to whether there was a delivery of any portion of the one hundred tons. We think a finding that there was a delivery of five tons of hay thereon is justified by the evidence. There was such a shipment and delivery that was not ordered through any other deal between the parties. It was shipped at the time

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the larger shipment was to be made, and we think it can be accounted for only by reference to that purchase. For the reason, therefore, that there was a part payment, and also part delivery, the contract was not within the statute of frauds.

The next point urged is that the court erred in not finding that there was an accord and satisfaction between the parties. Some time before the bringing of this suit, respondent J. E. Lilly was in the office of appellant, in Seattle, when an offer was made to adjust the differences between respondents and the corporation. Propositions by way of compromise were made by respondent J. E. Lilly, but they were not accepted. Appellant admitted some liability to respondents at that time, but did not take into account any liability by reason of respondents' loss growing out of the failure to complete the one-hundred-ton shipment. J. E. Lilly testified that he finally told appellant to pay what it was willing to pay, and that they would "scrap" over the balance. Appellant then made a check payable to the order of respondent firm for \$194.46. No memorandum was made upon the check that it was in full settlement of accounts, and no receipt passed between the parties to that effect. In view of the fact that respondents were then claiming something like \$2,600, together with the further fact, appearing in evidence, that a sharp and even angry dispute occurred between the parties just before the check was given, it seems improbable that the giving of the check was the result of an agreed settlement of the differences, in the absence of some note thereon or receipt to that effect. The testimony of J. E. Lilly upon that subject seems reasonable, when viewed in the light of attending circumstances, and we think the court did not err in refusing to find that there was an accord and satisfaction; especially inasmuch as the burden was upon appellant to show that fact.

Appellant contends that the damages allowed were excessive. The sum allowed was a little more than half that demanded by respondents. It is said that to sustain the dam-

ages found they must be measured by the Dawson market; whereas, it is argued that they should be measured by the Seattle market. We think, under the contract, the damages must be measured with reference to the Dawson market. The court found that appellant knew, when the contract was made, that the goods were to be sold in the Dawson market, and that it was necessary for that purpose that they should reach Dawson before the close of navigation for the season. Certainly, respondents' damages must have been the amount of profits that they would have realized from the Dawson market, if the shipment had been made and the goods had arrived there as agreed. They relied upon this expected shipment, were informed that all orders had been shipped, and it was impossible for them to obtain similar goods from any other source, after they learned that the shipment had not been made. Where a party in a distant place sells and agrees to deliver goods at a designated point, where he knows they are to be sold by the vendee, the measure of damages is the difference between the purchase price at the place of purchase and the market value at the point to which they are to be shipped, and where they are to be sold, less cost of transportation and necessary handling and sale expenses. *McCormick Harvesting Mach. Co. v. Jensen*, 29 Neb. 102, 45 N. W. 160; *Campbellsville Lumber Co. v. Bradlee*, 96 Ky. 494, 29 S. W. 313; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *Booth v. Spuyten etc. Mill Co.*, 60 N. Y. 487; *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Austrian & Co. v. Springer*, 94 Mich. 343, 54 N. E. 50, 34 Am. St. 350. The amount of damages allowed by the court was within the above rule, and there is ample testimony to support it.

Appellant assigns error in that the court taxed, as a part of respondents' costs, a twelve-dollar jury fee, which they had paid into the registry of the court. Afterwards it was stipulated to try the cause without a jury. Appellant urges that it should not be charged with this cost. The jury fee

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was, however, a proper disbursement for respondents to make. It inured to the benefit of appellant and established its right to a jury trial without payment on its part. When it subsequently developed that both parties were willing to try without a jury, respondents could not recall the fee. It therefore became a regular and legal disbursement in the case. Bal. Code, Section 5167, provides that the prevailing party "shall be entitled to his costs and disbursements." It was therefore not error to tax the jury fee in favor of respondents.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, and CROW, JJ., concur.

(No. 5548. Decided July 27, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. A. B. Cox,
Appellant.¹

CRIMINAL LAW—BURGLARY—INFORMATION—VARIANCE. It is not a material variance that an information charged the burglary of the residence of F "situated and numbered 1206, S avenue," and the proof showed that F occupied apartment No. 14 of a building the common entrance to which was number 1206, S avenue.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 10, 1904, upon a trial and conviction of the crime of burglary. Affirmed.

William C. Keith, for appellant.

Kenneth Mackintosh and *W. T. Scott*, for respondent.

ROOT, J.—Appellant was prosecuted jointly with one Reed for burglarizing "the dwelling house of Jacob Furth, situated, and numbered 1206, Summit avenue, in the city of Seattle." He was convicted, and from the judgment and sentence, he appeals to this court.

It is contended that there was a fatal variance between the

¹Reported in 81 Pac. 848.

proof and the allegations of the information as to the premises entered, the evidence showing that Furth and family occupied apartment No. 14 of a building the common entrance to which was No. 1206, Summit avenue. If this constituted a variance, which we do not believe it did, it was an immaterial one which did not prejudice the rights of appellant.

Error is also predicated upon the admission of the testimony of detective Wappenstein, as to a conversation had with defendant while the latter was under arrest. Appellant had an opportunity to show all of the circumstances surrounding the parties at the time of said conversation. Nothing was shown to render incompetent or immaterial the testimony as to what was said on that occasion. The giving of some of the instructions is assigned as error; but an examination of them fails to reveal anything prejudicial to appellant.

The judgment of the trial court is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, RUDKIN, and CROW, JJ., concur.

(No. 5570. Decided July 27, 1905.)

FRANK IRWIN *et al.*, Respondents, v. BUFFALO PITTS
COMPANY, Appellant.¹

PLEADING—ANSWER—ADMISSION—CONSTRUCTION—INCONSISTENT AVERMENTS. Express admissions in an answer control direct averments to the contrary, since the pleading must be construed most strongly against the pleader, and in the absence of an amendment evidence contrary to the admission is properly excluded.

PLEADINGS—AMENDMENT—SURPRISE—CONTINUANCE—DISCRETION. Where plaintiff relies upon an express admission in the answer and insists upon claiming a surprise, a refusal to allow an amendment except upon condition of a continuance, is within the discretion of the court.

PLEADING—ANSWER—DEFENSES—WHEN NOT INCONSISTENT—CONTRACTS. In an action upon a written contract to recover commissions for the sale of machinery, a partial defense that the contract con-

¹Reported in 81 Pac. 849.

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Syllabus.

tained a provision that ten per cent of any notes taken should be deducted from the commissions, if the note was not paid at maturity and expense was incurred, is not inconsistent with a defense setting up the statute of limitations, settlement, and that the sale was under another contract; and it is error to exclude evidence thereof.

EVIDENCE—LETTERS OF PARTY—FAILURE TO REPLY—ATTORNEYS—AUTHORITY. The failure of an attorney for collection to reply to letters asserting the debtor's version of a contract, does not admit their contents, or render them admissible in evidence as implied admissions of his client.

APPEAL AND ERROR—REVIEW—TRIAL—COMMENTS—HARMLESS ERROR. Comments of the court as to the incompetency of letters, at the time of properly excluding them, is not prejudicial error.

EVIDENCE—LETTERS—COMPETENCY—FAILURE TO ANSWER—ADMISSIONS—WITNESSES—IMPEACHMENT. The failure to answer letters or deny the statements therein, does not amount to an admission of the statements, so as to make the letters admissible to impeach testimony to the effect that that the party never admitted the statements; and the letters are properly excluded, even if competent as independent evidence, when offered only for the purpose of impeachment, where they contain nothing contrary to the evidence of the witness to be impeached.

CONTRACTS—EVIDENCE—IMMATERIAL CONTINGENCIES. An oral contract is to be proved by what is said and done, and objections to questions as to what a party would or might have done if the contract had not been as claimed are properly sustained.

PRINCIPAL AND AGENT—ACTION FOR COMMISSIONS—DEFENSES—EVIDENCE. Upon a claim by defendant that plaintiffs were to sell certain secondhand machinery and obtain commissions due them therefrom, evidence as to what was done with the machinery is admissible as a circumstance for the jury.

APPEAL—INSTRUCTIONS—HARMLESS ERROR—COMPROMISE AND SETTLEMENT. No prejudice can result from an instruction to find for the appellant if the jury find that a "full and fair" settlement was made, when the fairness of the settlement was in no way questioned.

PRINCIPAL AND AGENT—ACTION FOR COMMISSIONS—CASH SALES—ACCEPTANCE OF GOODS IN LIEU OF CASH. In an action for specified commissions on the sale of machinery, under a written contract authorizing only cash sales, the acceptance by the principal of secondhand machinery in lieu of the cash would be the equivalent of cash; and the failure to take cash could not be set up to defeat the agent's commissions.

APPEAL—REVIEW—VERDICT. A verdict upon directly conflicting evidence is conclusive on the supreme court.

APPEAL — DECISION — REDUCTION OF JUDGMENT. On reversing a judgment for error in excluding evidence of a partial defense in a specific sum, the respondent will be permitted to consent to a reduction of the judgment to the extent of such sum.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 13, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action to recover commissions. Reversed provisionally.

James A. Williams and Denton M. Crow, for appellant.

Merritt & Merritt, for respondents.

RUDKIN, J.—On the 14th day of March, 1900, the defendant entered into a written contract with the plaintiffs, whereby the plaintiffs were constituted agents of the defendant for the sale of farm machinery, at an agreed commission of twenty per cent on the printed price list of all machinery sold under the contract. On the 23d day of April, 1900, the parties entered into a second written contract, whereby the plaintiffs were constituted agents of the defendant for the sale of certain wind stackers, at an agreed commission of \$25 on each stacker sold under the contract. On the 17th day of August, 1900, the plaintiffs, as such agents, sold to one Berdan, a separator, engine, and other appliances, for the sum of \$3,350, and a wind stacker for the sum of \$250. This action was brought to recover the commissions on the two sales.

The defendant admitted the sales, but denied that they were made under the contracts above referred to, copies of which were attached to the answer. In addition to the denials, the answer contained the following affirmative defenses: (1) The statute of limitations; (2) that the sale of the machinery to Berdan was on the following terms and conditions: Berdan turned in a secondhand separator and engine, in part payment of the purchase price, at an agreed valuation of \$1,000, and executed three promissory notes, aggregating

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the sum of \$2,350, for the balance; that, at the time the machinery was sold to Berdan, it was agreed between the plaintiffs and the defendant that the plaintiffs' commission should rest in the secondhand machinery, that the secondhand machinery should be sold and \$350 of the selling price paid over to the defendant, and that the balance of the selling price should constitute the plaintiffs' commission on the sale; and it was further alleged in this defense that the plaintiffs were only authorized to sell for cash, under the written contracts between the parties; (3) a settlement of the matter in controversy; and (4) that the contract between the parties contained a provision that, if any note given for machinery became delinquent and the defendant incurred extra expense in its collection, ten per cent of such note should be charged against, and deducted from, the commissions due the plaintiffs; and it was averred that Berdan permitted two of the machinery notes to become delinquent, and the defendant was greatly delayed and incurred extra expense in their collection. The reply in substance denies these affirmative defenses. The case was tried before a jury, and from a verdict and judgment in favor of the plaintiffs, the defendant appeals.

The first error assigned relates to the exclusion of evidence tending to establish the fourth affirmative defense. Paragraph 10 of the complaint alleged that the first two notes to mature were paid at maturity, and that a part of the third note of \$950, which matured October 15, 1902, was paid on the day of, 1902, and the balance in 1903. This paragraph of the complaint was expressly admitted by the answer. As stated in the affirmative defense, the contract under which the respondents claimed to have sold the machinery provided that, if any note given for machinery became delinquent and the appellant incurred extra expense in its collection, ten per cent of such note should be deducted from the commissions due the respondents. The affirmative defense alleged that the two last notes to mature were not

paid at maturity, and that the appellant had incurred extra expense in their collection.

When the appellant offered to prove that the last two notes were not paid at maturity, it was met with the objection that the answer expressly admitted paragraph 10 of the complaint, which alleged that the second note was paid at maturity. We think the objection was properly sustained as to this note. The question of inconsistent defenses does not arise here, as an admission of a paragraph of a complaint is not a defense. The answer contained an express admission that the second note was paid at maturity, and a direct averment that it was not paid at maturity. A pleading is construed most strongly against the party who interposes the plea, and we have no doubt that the express admission should control, and exclude testimony tending to show the contrary, until the inconsistency was removed or obviated by amendment.

The respondents insisted that they had relied on the admissions in the answer, and would not be ready to proceed with the trial if an amendment were allowed. The court thereupon intimated that it could not allow an amendment, unless there was a continuance. The appellant contended that the respondents were sufficiently advised as to the nature of its defense, and were not taken by surprise, but the court ruled otherwise, and denied the application to amend. There was no error in this ruling. The appellant insisted on the right to amend during the trial, without a continuance, and a refusal to permit an amendment on such terms was a proper exercise of the court's discretion.

The appellant thereupon offered to prove that the last note was not paid at maturity, and that extra expense had been incurred in its collection. The court excluded this testimony, on the ground that this defense was inconsistent with the other defenses interposed. This ruling was error. The defense which the appellant sought to establish grew out of the contract upon which the respondents relied for a re-

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covery. It was not inconsistent with any admission in the answer. It certainly was not inconsistent with the defense that the action was not commenced within the time limited by law. Nor was it inconsistent with the defense that there had been a settlement between the parties. Disputed claims are often settled, and the settlement of a claim does not thereafter preclude a party from showing that the claim had no existence in fact. Defenses are not inconsistent unless one of them is necessarily false. Nor was this defense inconsistent with the defense that the machinery was sold under a different contract. The latter defense was simply an argumentative denial, and should have been stricken on motion. The defense, therefore, that one of the notes given for the machinery was not paid at maturity, and that extra expense was incurred in its collection, was not inconsistent with, or nullified by, any other defense interposed, and the appellant should have been permitted to establish it, if it could. In *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177, the answer denied the transfer of the notes in suit to the plaintiffs, and thereafter, in three affirmative defenses, alleged such transfer affirmatively. These defenses were held to be inconsistent. In concluding its opinion, the court said:

"In conclusion, this much at least must be demanded, that, however diversified the answers may be, they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another, they cannot be allowed to stand, and the plaintiff will not be compelled to sustain the truth of an allegation the truthfulness of which is asserted by the defendant."

In *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393, it was held that a plaintiff could not, in one part of a reply, admit the execution of a contract, and deny it in another. What we have said we think sufficiently shows that these cases are not in point here. A defendant is certainly not precluded from showing that a plaintiff is not entitled to

recover under the contract upon which he relies, by claiming that the work was done under another or different contract.

The next assignment of error relates to the exclusion of certain letters written by the appellant to one of the respondents' attorneys, and to the comments of the court thereon, in view of the fact that the letters were afterwards admitted by consent. These letters were not competent for any purpose. They simply stated the appellant's version of the agreement between the parties in relation to the commission for the sale of this machinery. Surely, it cannot be maintained that an attorney for collection is bound to enter into a controversy with a debtor over the merits of a claim in his hands for collection, or to deny any assertions made in relation thereto. Such an attorney has no authority to bind his client by an express admission, much less by an implied one, such as a neglect or failure to answer a letter. These letters were properly excluded, and the comments of the court as to their competency could not be prejudicial error, whether the letters were afterwards admitted or not.

The appellant further offered in evidence three letters written by the appellant to the respondent Irwin, and two letters from Irwin in reply. These letters were first received by the court, and then a controversy arose between the court and counsel as to the purpose for which the letters were received, and their effect. Irwin was called as a witness in rebuttal, and testified that he never admitted that his firm was to collect their commission out of the old machinery. He further admitted that he never answered the letters received from the appellant, which set forth that the agreement was as now contended by it. The utmost that is claimed for these letters is, that the respondents did not deny the claims therein set forth to the effect that they were to receive their commission out of the old machinery. It is not claimed that the letters contained any express admissions inconsistent with the testimony of the witness, or that they impeached him in any way. While the letters might be competent, independent,

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testimony in favor of the appellant, we do not think they were competent for the purpose of impeachment or competent in rebuttal at all. Counsel offered them for the purpose of impeachment only, and contended that they were competent. The court determined otherwise, and we think rightly. The witness said that he never made any admissions, that he never answered the letters, and they showed nothing to the contrary.

It is next assigned as error that the court sustained objections to certain questions propounded to the witness Evans, who claimed to have made the special agreement with the respondents for the sale of the machinery to Berdan. The purport of these questions was, whether the witness would have made the sale had not the respondents agreed to take their commission out of the old machinery, and what the witness would have done, had they not so agreed. The contract must be established by what was said and done by the parties, and not by what either party would or might have done under a given state of facts. The objection was properly sustained. It is next assigned as error that the court admitted testimony, over objection, showing what was done with the secondhand machinery after the sale to Berdan. This was clearly a proper circumstance to go before the jury.

The next error assigned relates to an instruction given by the court on the question of settlement, as follows:

"I instruct you that, if you find from the evidence that such a settlement was entered into, and that the settlement was full and fair, that the verdict should be for the defendant."

The use of the words "full" and "fair" in this instruction is criticised by the appellant. There was no question of the fairness of the settlement, if any were made, involved in the case, and we do not think that the use of these words could prejudice the appellant. Furthermore, we have grave doubts whether there was any testimony in the case which warranted the submission of this question to the jury.

It is next contended that the written contract between the parties only authorized cash sales. If that were true, the acceptance by the appellant of machinery or anything else in lieu of cash, would be the equivalent of cash, so far as the respondents are concerned. Error is next assigned on the ruling of the court on the motion for a new trial. There was a direct conflict in the testimony as to the contract under which the machinery was sold, and the verdict of the jury upon that question is conclusive upon this court. Error is assigned upon the refusal of the court to give certain instructions requested by the appellant, but we think the instructions given were full and fair, and substantially embodied the appellant's requests. We do not deem it necessary to reverse the judgment absolutely for error in excluding testimony, as the utmost that the proof offered could avail the appellant would be a deduction of ten per cent of the third note, or \$95, from the amount of the verdict.

The judgment is reversed, and if the respondents, within thirty days from the filing of the remittitur in the court below, file a release of the sum of \$95 from the amount of the judgment, a new judgment shall be entered for the amount of the verdict, with interest from date of rendition, less the sum of \$95. If no such release is filed, the court below will grant a new trial. The appellant will recover its costs in this court.

MOUNT, C. J., FULLERTON, HADLEY, and ROOT, JJ., concur.

CROW, J., being disqualified, took no part.

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(No. 4953. Decided July 27, 1905.)

A. L. SMITH *et al.*, Respondents, v. ST. PAUL, MINNEAPOLIS
& MANITOBA RAILWAY COMPANY, Appellant.¹

39	355
41	300
41	494

EMINENT DOMAIN—DAMAGING OF PROPERTY—RAILROADS—CONSTRUCTION—OPERATION—NOISES, FUMES, SMOKE—INCIDENTAL DAMAGES—DAMAGE ABSQUE INJURIA. The word "damaged" as used in Const. art. 1, § 16, providing that private property shall not be damaged or taken without just compensation having been first made, was not intended to give a right of action where the injuries to property would otherwise have been *damnum absque injuria*, in an action against a natural person or private corporation; hence damage can be recovered for the operation of a railroad on its own nearby property only for such injurious physical effects as the jarring of the earth on the plaintiff's lots, casting soot and cinders thereon, or the emission of smoke physically affecting the property, and not for the usual noises and the emission of fumes, smoke or odors necessarily incident to the operation of trains, not resulting from negligence; these being regarded as *damnum absque injuria*.

SAME—ACCESSIBILITY OF CROSS-STREETS. Excavations by a railroad company, through cross-streets in the neighborhood, affecting the accessibility of the streets, do not constitute an injury to plaintiff's property for which he is entitled to damages, where his property does not abut upon the street, although he may use said streets more than any one else, since his injury differs from that of the public only in degree and not in character.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered June 29, 1903, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages to property by the construction and operation of a railroad. Reversed.

M. J. Gordon and C. A. Murray, for appellant.

Barnes & Latimer, S. C. Hyde and W. F. Townsend, for respondents.

Root, J.—Respondents are the owners of lots 7 and 8, in block 6, of Ide & Kauffman's Addition to Spokane, which lots face upon the north side of Bridge avenue, a public street

¹Reported in 81 Pac. 840.

sixty feet in width, having an east and west course. Said lots extend from said avenue northerly one hundred and seventeen feet along the line of Cannon street, which is sixty feet wide, running north and south. Prior to this action appellant had constructed and was operating a railway line, which, for a distance of about a quarter of a mile to the east, and for a half mile to the west, of respondent's property, paralleled said Bridge avenue at a distance of sixty-three and one-half feet to the south thereof. In front of respondents' property, and for some distance on either side, there is an excavation or cut of some twelve feet in depth, in which appellant's railway track is laid. The nearest rail is one hundred and twenty-three and one-half feet distant from the nearest portion of respondents' property. Respondents allege that the ringing of bells, the sounding of whistles, and other noise incidental to the running of trains upon this railway track, together with the smoke, fumes, soot, and cinders from the locomotives, and the jarring of the earth by passing trains and the excavations in cross-streets, have occasioned serious damage to their property and have materially reduced the market value thereof. They brought this action to recover said damages, basing their right of action upon that portion of § 16, art. 1, of the state constitution, which reads as follows:

"No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner."

They recovered judgment in the lower court, from which appeal is taken to this court.

It is not contended that the noises or other annoyances complained of are other than those which are naturally and necessarily incident to the proper operation of the railway, and it is not contended that any or all of these things constitute a nuisance. But it is urged that their property is "damaged," within the meaning of that term as used in the constitution. This railway is built upon land purchased or

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condemned by the railway company, except where it crosses public streets. No street is crossed at any point adjacent to respondents' property. It is contended, however, that, inasmuch as appellant has made an excavation through the streets, which has impaired the accessibility of said streets, near respondents' property, they are injured thereby.

Appellant contends that all of these injuries, complained of by respondents, are occasioned by results which are naturally and necessarily incident to the operation of the road, which is a legitimate business, and that they do not constitute damages such as are contemplated by the constitutional provision aforesaid. It is urged that, in so far as they are injurious to respondents at all, they are *damnum absque injuria*. Appellant maintains that the constitutional provision, *supra*, and similar provisions found in various state constitutions, were inserted, not with the intention of giving a cause of action for every injury which might occur, but to place public corporations upon a plane with private corporations and individuals, and to make such public corporations liable under the same circumstances that would hold persons and private corporations liable.

It seems to be conceded that, prior to the adoption of these constitutional provisions containing the word "damaged," or equivalent expressions, the word "taken" as found in most of the constitutions was not construed to give any right of action against states, counties, and cities, public or quasi public corporations, where no tangible property was physically taken, even though the use of said property was materially interfered with and its value depreciated. Several of the older states amended their constitutions by adding the word "damaged," and a number of the new states placed said word in their organic law at the time of its original adoption. Our attention has been called to this, or a similar provision, in the constitutions of the following states: California, Colorado, Georgia, Illinois, Missouri, Nebraska, Pennsylvania, Texas, and West Virginia; and we believe the same, or similar

provisions, are found in the constitutions of Arkansas, Kentucky, Montana, and the Dakotas.

In California, Georgia, Illinois, Missouri, Pennsylvania, and West Virginia, the contention of appellant appears to be upheld, and damages seem not to be allowed where the same are consequential or incidental merely to the carrying on of a legitimate business. In Nebraska and Texas the courts evidently hold the other way. There are many cases holding that any obstruction to a public street in front of, or adjacent to, real property entitles the owner of said property to a right of recovery against the one causing said obstructions, even though they be used as a railway, viaduct, or for other legitimate purposes. But the weight of authority appears to be against the right of a property owner recovering for damages occasioned by the legitimate use by another of his own property, so long as said damages are not such as physically affect his property, or some right appurtenant thereto. This was the rule of law prior to the adoption of these constitutional provisions including the word "damaged," and there seems to be sound reason for the contention that this term was placed in new and amended constitutions so that public and quasi-public corporations should be held for damages upon the same grounds as others.

Such seems to have been the view taken by this court in the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, where the following language was used:

"The earlier constitutions of the several states in the Union contained, with but few exceptions, a provision that private property should not be taken for public use without just compensation. The constitution of the United States contains substantially the same provision, which was applicable to the territory. Under these provisions, however, owing to the interpretation put upon the word 'taken' by the courts of the several states, with the exception of the courts of Ohio, great and manifest injury was constantly done by the states, counties and cities to the private citizen without any legal

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means of reimbursement. The theory was that wherever the state, through its legislative acts, authorized any of its agents to make public improvements, so long as these agents carried on their work within the scope of their authority, and without negligence, they were liable to no one, whatever damages might accrue. A citizen was thus left without protection in all that large class of cases where, through some act done for the public benefit, or for a use public or *quasi* public, although no part of his tangible property was physically taken, the use or value of his property was palpably impaired, or was stripped of incidents comprised within the conception of complete property rights which brought to those rights quite as much value as the mere possession of the property."

In construing a word or expression of a statute or constitution susceptible of two or more meanings, the court will give that interpretation most in accord with the manifest purpose of the statute or constitutional provision. Where the word or expression constitutes an amendment, the court will consider the old law, the mischief sought to be corrected, and the remedy. With all these in mind, the court will give the new term or language such construction as will effectuate the evident intention and purpose of the makers. Under the constitutions providing compensation for the taking of property, it was almost uniformly held that public corporations might in different ways greatly injure the property and property rights of others, but could not be held in damages unless there was an actual taking of some portion. The word "damaged" being employed to give relief to those thus affected by the actions of public or quasi-public corporations, it is argued that it should not be assumed that said word was intended to have any other and wider meaning than it then possessed as a well understood legal term. Ordinarily one may use his own property in any legitimate manner he chooses; and, prior to the employment of the word "damaged" in state constitutions, no such property owner was liable to any one else for any injuries consequent upon, or incidental to, such lawful use of his own property.

Applying to the constitutional provision in question the usual tests and rules, and having due consideration for the weight of judicial opinion, as we find it expressed by the courts that have passed upon this question, we are disposed to hold that the word "damaged," as used in our constitution does not give a right of action in a case where the injuries would have been; in the absence of said word, *damnum absque injuria* in an action against a natural person or private corporation.

It would seem to be only reasonable to suppose that persons acquiring property in a thickly settled community must have anticipated the use of neighboring property in a manner not always to be agreeable and pleasant. A person buying property in a growing city must be presumed to have done so for the benefits to come to him by reason of being a property owner in such a city. The presence and operation of railroads are necessarily attendant upon the growth and prosperity of such a city as Spokane. Probably respondents would not have become property owners therein had it not been for the present and prospective railroad facilities of the city. As such purchasers and owners, they knew that more railways would be required as the city grew and became more important. The very growth and development which made city property, as a whole, more valuable and opportunities for business prosperity greater, required the building and operation of more railway lines. No one could buy property in such a growing city without realizing that this would be a natural and necessary result. Where such new lines might be constructed, a person could not foretell. But he would know that they must be near other property, and that their operation, however legitimate and careful, must entail consequential injuries upon the owners of such nearby property. Electing to purchase property in such a community where his property might profit by the industrial and commercial activities of others, it is but just to hold that, with the advantages, he should also accept the burdens necessarily inci-

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dental thereto. If one resides on a parcel of city property, his neighbors on three sides may lawfully erect high buildings for legitimate purposes which will entirely shut off access, light, and air from those three sides. This greatly reduces the value of his home. It makes it unpleasant and undesirable, increases his insurance rates, subjects him to unpleasant noises and disagreeable sights. But so long as these neighbors use their property lawfully and avoid creating a nuisance, he has no right of action against them. So it is when nearby property is used in a proper manner for railway purposes. So long as such use does not affect the property of others in a physical manner to its detriment, the consequential injuries do not come within the meaning of the word "damaged," as used in the constitution—providing, of course, that a nuisance is not created.

In the case at bar, appellant is operating its railway upon its own property except where the same crosses the public streets. No nuisance is alleged. Complaint is made of the ringing of bells, sounding of whistles, rumbling of cars, jarring of the earth, and the casting of cinders and soot upon, and smoke and fumes across, respondents' premises. They claim also to be injured by reason of the uncovered cuts through the cross-streets, and the wooden bridges over other of said cuts, which make the use of such streets more difficult.

The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property, are injurious physical effects to the *corpus* of respondents' property, which, we think, come within the scope of the term "damaged," as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of

the neighboring property entails thereupon. But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes, and odors are necessarily incidental to the proper operation of the road, and when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by any one acquiring property in or about such a city, and are regarded as *damnum absque injuria*.

It is urged that the excavations made through the cross-streets in respondents' neighborhood constituted an injury for which they are entitled to damages. We think not. If the railroad was constructed in the public street adjacent to respondents' lots, they would be entitled to recover whatever damages were occasioned thereby. This is upon the theory that every owner of property bordering upon the street has a right to access, light, and air therefrom, which right is an appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the land owner, and not shared in kind by others. But where the injury complained of is an obstruction, not adjacent to the land of the person in question, but to a street in the neighborhood which he uses, or might use, in common with the public in general, he has no right of action as an owner of injured property. That he may use the street more often than most or all others, makes a difference only in degree and not in character, and does not entitle him to damages by reason of injury to his property.

The questions involved herein have been carefully considered and passed upon by many courts; and in view of the importance of said questions, we feel that we may very properly set forth extracts from several of the opinions of these courts. In the case of *Brown v. Seattle, supra*, this court used the following language:

"The makers of the Illinois constitution used the word in that instrument for some purpose. Other states changed their constitutions for substantially the same purpose. They

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took the new phrase subject to the general rule of construction, that the adoption of constitutional or statutory language by one state from another adopts to some extent, at least, the construction put upon the borrowed language by the courts of the state from which it came. After almost twenty years of discussion and decision in Illinois and other states, we put the words 'taken or damaged' into our constitution, and they must have their effect."

In view of the principle of construction thus recognized, it becomes important to see what the courts of Illinois hold upon this proposition. In the case of *Aldrich v. Metropolitan etc. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, the supreme court of that state quotes approvingly from one of its former decisions, as follows:

"The question then recurs, what additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street. If it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject the common law afforded redress in all

such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

And then makes the following observations:

"That case, ever since its decision, has been regarded as laying down the proper rule on the subject, and is, we think, conclusive of the case at bar. Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the construction and operation of the road. Noise, the obstruction of light and of view, are necessary incidents of the construction and operation of such roads, and if every property owner could recover in all such cases, the making of public improvements would become practically impossible. This road is not constructed along the street in front of the plaintiff's property, thus injuring or destroying a public right which she enjoyed in connection with her property, but, as before said, it is constructed on its own land or right of way. Therefore, what the rights of an abutter would be in such a case it is not necessary to consider. In *Illinois Central Railroad Co. v. Grabill*, 50 Ill. 241, in speaking of the annoyances of running engines, the escape of steam, etc., near the plaintiff's premises, this court said (p. 244): 'Such consequences of the construction and use of railroads must be borne by all living near them, without complaint and without hope of redress, for they are inseparable from the purposes and objects of such structures, but that a recovery can and should be had for such damages as arise out of the careless and negligent acts of a railroad company in regard to any usual and necessary appurtenance to their road cannot be denied.' (*City of Chicago v. Union Stock Yards*, 164 Ill. 224.) A railroad constructed and operated by authority of law cannot be a nuisance, and there was no right of action at common law for the depreciation in value of property so caused. The company is liable for negligent

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or willful injury, as others are, but not for doing the things which the law authorizes it to do. Nor can we agree that the constitution of 1870 gives, or was intended to give, a remedy for all incidental losses, or for the depreciation of the value of property, caused by the construction and operation of railroads in the vicinity, but as said in the *Rigney case*, it was intended only to restore a remedy which existed at common law but which had been denied by legislation and the constitution of 1848."

In the recent case of *Bennett v. Long Island R. Co.* (N. Y.), 74 N. E. 418, the court of appeals of New York adopts the language of the appellate division of the supreme court as follows:

"The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent."

And, after referring to certain peculiarities of the case, the court of appeals makes the following statement:

"But underlying even these cogent considerations there is the basic distinction that when the legislature authorizes the operation of a steam surface railroad it impliedly sanctions and legalizes those inconveniences and annoyances to others which are inseparable from the proper conduct of such an enterprise."

In the case of *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659, the supreme court, in an elaborate and instructive opinion, says:

"No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own prop-

erty, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. . . . The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the center of a town as possible, is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and, where it is done without negligence, entails no legal liability therefor. . . . We understand the word 'injury' or (injured), as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility. That I am correct in the meaning we attach to the word 'injured,' appears abundantly by our own authorities. . . . The language of the constitution is not equivocal and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world."

The same court, in *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618, said:

"We agree, indeed, that if the ordinary and proper use of the railway is to be regarded as an element of damage, as to a certain extent it is in the case of a condemnation, the rule stated is the correct one; but as this rule is not one of common-

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law but of statute, it cannot apply to the case now being considered: *Railroad Co. v. Yeiser*, 8 Penn. St. 366. Unless, therefore, the case can be brought within some statute, the rule by which damages are measured by advantages and disadvantages ought not to have been adopted; for, as was said, in the case cited, per Mr. Justice Rogers, 'it is a principle well settled by many adjudicated cases, that an action does not lie for a reasonable use of one's right though it be to the injury of another. For the lawful use of his own property, a party is not answerable in damages, unless on proof of negligence.' How, then, we ask, can a lawful erection by the Pennsylvania Railroad Company, on its own ground, be the subject of damage to the adjoining land-owners? And why may it not as put by the defendant's first point, operate and use, in a lawful manner, its Filbert street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity, on his own property, just what the railroad company has done. He might build a house, and thus shut out his neighbor's view, light and air; he might build an embankment, or run a road on or along his own line, and be liable for nothing as long as he used his house, embankment or road in a lawful manner, although in either case an injury may have been done to the adjacent property. Who does not know that even in the country no householder escapes injury and annoyance from clouds of dust raised in dry weather by the passage of teams over the common roads? And in the cities this grievance is further aggravated by the intolerable noise occasioned by the use of stone pavements. Nevertheless, we have yet to hear of a case where one lawfully using such road or street was held liable for the injury thus occasioned. When a company takes, by its right of eminent domain, part of a tract of land, and the damage to the balance is to be measured by the advantage over the disadvantage resulting from the company's works, in such case, as we held, in *Searle v. The Railroad Co.*, 33 Penn. St. 57, contingent and even imaginary damages may be considered by way of offset to the alleged advantages. But whilst this is so, such damages cannot be regarded as a substantive claim."

The supreme court of Georgia, in an elaborate opinion reviewing many authorities and bearing evidence of careful

consideration, among other things, in the case of *Austin v. Augusta etc. R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, says:

"In this sense, and as a well-defined law term, it was used in the constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damaged, but it did not give him compensation for depreciation in value caused by any legal act; since in law such an act was innocent, and therefore harmless, or, if not actually harmless, *'damnum absque injuria.'* There is nothing in the language of the constitution, or in the debates or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term. Nor was this sentence framed with a view of changing the substantive law of damages, or of making that actionable which before that time had been non-actionable. Rather, the purpose was, to make the law of damages uniform, so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain. . . . Properly conducted, decently appointed, and orderly managed stores, shops, factories, and business houses, erected in close proximity to residential quarters, frequently cause great depreciation in values; in the popular sense they cause damage, but in such cases the annoyances, the inconveniences occasioning the loss in value, are not actionable, because they arise from lawful uses. The owners of these establishments are as much entitled to the use and enjoyment of their property as is the owner of the residence property reduced in value by their presence. The first occupier of land does not acquire the right to prevent his neighbor from erecting walls, digging excavations, erecting buildings, or engaging in manufacturing or mercantile business thereon, no matter how seriously such acts may depreciate the market price of adjoining property. If the acts complained of do not amount to a nuisance, there is neither legal nor moral wrong done to the plaintiff. . . . For a physical invasion or wrongful interference with property or its appurtenances, resulting in damage, the plaintiff may recover. Without some wrongful act on the

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part of the defendant she cannot recover, even though there is deterioration in the value of her property."

As bearing upon the claim of damage on account of excavating across neighboring streets, the following three cases show the trend of judicial decision:

Van De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. 396, wherein the supreme court of Missouri said:

"What we do say is this, that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected. . . . His property is not specially affected. If the plaintiff is entitled to damages in this case, then compensation must be allowed for any depreciation in the market value of property, arising from the erection of a court house, jail, or other public building. The text-writers cited say such cases are not within the amendment, and to this we agree."

The case of *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82, where the supreme court of California spoke as follows:

"The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. . . . The provision in the constitution invoked by them was inserted therein to provide for instances in which property was not taken from the possession of the owner, or into physical occupancy by the public, and applies only to such damages as may be recoverable under established rules of law. The damage which the appellants may sustain by reason of a diminution in value of their lands is not damage for which they are entitled to compensation."

The opinion in the case of *Gilbert v. Greeley etc. R. Co.*, 13 Colo. 501, 22 Pac. 814, contains an able discussion of the subject, from which we present the following extracts:

"The *corpus* of his property is not affected by any physical contact with the railroad tracks, nor is any street or alley, so far as the same borders on his premises, in any way interfered with. . . . One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action. . . . His damage, therefore, may or may not differ in degree. It certainly does not differ in kind from that of the general public. . . . The constitution of Colorado, article 2, section 15, provides 'that private property shall not be taken or damaged for public or private use without just compensation.' . . . Private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property, or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property, and which is not shared with or enjoyed by the public generally. . . . While it is admitted that plaintiff's property is rendered less valuable by reason of such obstruction, yet, to bring the case within the meaning of the constitution, it must also appear that he has some special private property, right or interest, as a private right of way or user, in Twelfth street, at the point of obstruction, other or different from the right or interest of the general public, and that such property, right or interest of plaintiff has been damaged for public use. Notwithstanding the broad terms of our constitution, and the unqualified expressions of certain judicial opinions, we are not prepared to say that whenever a depreciation in private property is caused by some public or private improvement the owner of the property thus depreciated may recover compensation against the party making such improvement. It is probable that, in consequence of every improvement resulting from new inventions or discoveries, the private property, rights or interests of some person or persons have been damaged or injuriously affected. In many instances the construction and operation of railroads have driven stage companies and post-chaises out of existence, and rendered the property invested therein, as well as such business, comparatively valueless. . . . It

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may be susceptible of demonstration that every railroad company running its trains across a street or public highway causes damage or inconvenience in a greater or less degree to every traveler having occasion to use the street or highway at the point of such crossing, as well as to every person owning or occupying real estate anywhere in the vicinity of such crossing; and yet there is no remedy for such damage, under ordinary circumstances, for the reason that as a general rule no one has any special, private property or interest in the public highway other or different from the general public, and the damage thus suffered is common to all having occasion to use the street or highway. In such case, therefore, private property cannot be said to be taken or damaged for public use, within the sense or meaning of the constitution. It is only when some specific private property, or some right or interest therein or incident thereto, peculiar to the owner, is taken or damaged for public or private use that the constitution guarantees compensation therefor. *City of Denver v. Bayer*, 7 Colo. 113; *Railroad Co. v. Nestor*, 10 Colo. 403; *Whitsett v. Railroad Co.*, 10 Colo. 243; *Rude v. City of St. Louis*, 93 Mo. 408; *Morgan v. Railway Co.*, 64 Iowa, 589; *Shaubut v. Railroad Co.*, 21 Minn. 502."

Lewis, Eminent Domain (2d ed.), § 236, says:

"Every owner takes the chance of having the value of his property enhanced or diminished by the use made of surrounding property, and the character of the improvements put upon it. He has no cause of complaint on account of the nature of such uses or improvements, unless they amount in law to a nuisance. The grievances which lead to the insertion of the words 'damaged' or 'injured' in recent constitutions, did not consist in the fact that such damages as have just been referred to went without redress, but in the fact that, under the restricted interpretation put upon the word 'taken,' private property might be subjected to physical injuries, and valuable rights appurtenant thereto or connected therewith, might be impaired or destroyed for public use without compensation. These words were not inserted for the purpose of preventing the public from doing what every private individual may do without liability to his neighbor. They were not intended to confer a right of action for a use of

property by the public, which a private individual might make without legislative authority."

In addition to the foregoing authorities, the following shed light upon the questions under consideration, viz.: *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. 859, 36 L. R. A. 519; *Adams v. Chicago etc. R. Co.*, 39 Minn. 286, 39 N. W. 629, 12 Am. St. 644, 1 L. R. A. 493; *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Rinard v. Burlington etc. R. Co.*, 66 Iowa 440, 23 N. W. 914; *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, 33 N. W. 456; *Hanlin v. Chicago etc. R. Co.*, 61 Wis. 515, 21 N. W. 623; *Presbey v. Old Colony etc. R. Co.*, 103 Mass. 1; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. 164; *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 198; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 256; *Fobes v. Rome etc. R. Co.*, 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; *Decker v. Evansville etc. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Werges v. St. Louis etc. R. Co.*, 35 La. Ann. 641.

To sustain respondents' contention that each and every of the matters complained of constitutes a cause of action, would be to open the door to endless litigation over damages remote, vague, indefinite, and uncertain, and against corporations and persons engaged in all lines of industrial activities. We believe this would be decidedly obnoxious to sound public policy, and cannot believe the framers of the constitution, or the people in adopting it, ever intended such results.

The learned trial judge having made certain rulings inconsistent with the conclusion herein reached, and to the prejudice of appellant, the judgment of the superior court is reversed and the case remanded for a new trial.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

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(No. 5595. Decided July 27, 1905.)

J. EUGENE JORDAN, *Respondent*, v. ISAAC P. HUTCHINSON
et al., *Appellants*.¹

APPEAL—FINAL ORDERS—ORDER OF DEFAULT. A refusal to vacate an order of default before final judgment is not final or appealable, and is reviewable on appeal from the final judgment.

JUDGMENT—VACATION—AS MATTER OF RIGHT ON PUBLICATION OF SUMMONS—ACTIONS FOR RECOVERY OF LAND—STATUTES—CONSTRUCTION. Bal. Code, § 5518, giving an absolute right to vacate a judgment had upon the publication of summons in an action to recover the possession of land, has no application to a judgment in an action to set aside conveyances for fraud and subject land to the lien of judgments.

JUDGMENT—VACATION—GOOD CAUSE—SHOWING. Good cause for the vacation of a default judgment secured on publication of summons does not appear from the fact that defendant's place of residence might have been ascertained by the plaintiff, where plaintiff and his counsel made diligent effort to ascertain the same without success, and where defendant had actual knowledge of the pendency of the suit thirteen days before the default.

Appeal from a judgment of the superior court for King county, Bell, J., entered January 4, 1905, upon overruling defendant's motion to vacate an order of default, in an action to subject lands to the lien of judgments. Affirmed.

Byers & Byers, for appellants.

Allen, Allen & Stratton, for respondent.

HADLEY, J.—Respondent moves to dismiss this appeal. The notice of appeal states that the appeal is from the final judgment in the action, and also from an order entered prior to the final judgment. The order mentioned was one denying a motion to vacate an order of default previously entered. The default order was entered April 22, 1904, and the order denying the motion to vacate the default was entered June 25, 1904. Judgment in the cause was not entered until Janu-

¹Reported in 81 Pac. 867.

ary 4, 1905, and the appeal notice was served on the 10th day of the same month. Respondent urges in support of the motion to dismiss the appeal that, if the refusal to vacate the order of default was appealable, then it follows that the appeal was not taken in time, and that this court is without jurisdiction. It is conceded that orders vacating default judgments are not appealable, under the decisions of this court; but it is pointed out that a refusal to vacate a final judgment by default is appealable. It is argued that, for the same reasons which make a refusal to vacate a final judgment by default appealable, a refusal to vacate an ordinary order of default entered before final judgment is also appealable. We think, however, that, under our statute governing appeals, the two cannot be classified as similar. A refusal to vacate a final judgment is a final order made after judgment, which affects a substantial right, and is appealable, under Bal. Code, § 6500, subd. 7. A refusal to vacate a mere order of default is not a final order made after judgment, but is one made before judgment, and subd. 1 of the section of the statute above cited expressly provides that the appeal from the final judgment shall bring up for review any order made in the same action before judgment. The appeal from the final judgment in this case therefore brings up for review the refusal to vacate the order of default, and the motion to dismiss the appeal is denied.

Upon the merits of the appeal, the error assigned is that the court erred in denying appellants' motion to vacate the order of default, and in entering judgment for respondent. The action was brought for the purpose of setting aside certain conveyances of real estate as having been fraudulently made, and to subject the land to the lien of judgments held by respondent. The service of process upon appellants was by publication of summons. They contend that, under Bal. Code, § 5518, they have the absolute right at any time within two years, to have an order vacating the judgment. The contention is based upon the following portion of said section:

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"When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant, or his successor in interest as to the whole or any part of the property, shall, upon application to the court, or judge thereof, be entitled to an order vacating the judgment, and granting him a new trial, upon the payment of the costs of the action."

Whatever may be said of appellants' argument if this were a case coming within the terms of said statute, it is, however, sufficient to say that the statute does not apply to this case. It relates alone to actions for the recovery of possession of real property, and this is not such an action.

Considering the application to vacate the default, with reference to either § 4880 or § 5091, Bal. Code, it will be observed that the former section provides that, when the summons is not personally served, a defendant shall "on application and sufficient cause shown," at any time before judgment, be allowed to defend; and the latter section provides that the court may, in its discretion, before final judgment, set aside any default upon affidavit showing good and sufficient cause. Has good and sufficient cause been shown here? And has the court abused its discretion in refusing to vacate the default in this case? One of the appellants made affidavit in support of the motion to vacate, that he resided in Boston, Massachusetts, when the summons was published; that his place of residence could have been discovered from the records of the auditor's office, or of the treasurer's office, of King county, and that respondent or his attorneys could have known the same by the exercise of ordinary diligence. The affidavit does not state that appellant had not actual knowledge of the pendency of the action in ample time to have appeared and defended the same. A counter affidavit made by respondent's counsel discloses that both respondent and his counsel made diligent inquiry to ascertain the address of appellants at the time the action was commenced, and that they were unable to discover it; that appellants had actual knowledge

of the pendency of the action at least thirteen days prior to the entry of the default, at which time they wrote a letter addressed to their attorneys in Seattle concerning the action; that the affiant saw the letter six days before the default was entered. These statements are not denied by anything appearing in the record. The record shows no more than neglect on the part of appellants. We therefore think sufficient cause was not shown for opening the default, and that the court did not abuse its discretion in refusing to vacate it. *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Sanborn, Vail & Co. v. Centralia Furn. Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; *Haynes v. Schwartz Co.*, 5 Wash. 433, 32 Pac. 220.

Under the record before us, and within the authority of the statutes and decisions cited, the court did not err. The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, FULLERTON, and RUDKIN, JJ., concur.

(No. 5515. Decided July 23, 1905.)

GEORGE D. PRICE, *Respondent*, v. THE CITY OF SEATTLE
et al., *Appellants*.¹

OFFICERS — REMOVAL — MUNICIPAL CORPORATIONS — EMPLOYEES. In the absence of restraints, the power of appointment to an office for an indefinite term implies the power to remove.

SAME—REVIEW BY COURTS. The removal of a municipal employee or officer holding an indefinite term, pursuant to the charter provisions therefor and approved by the civil service commission in the manner directed, is final and cannot be reviewed by the courts, where the charter authorizes the appointing power to make the removal upon the filing of a statement in writing of the reasons therefor, and provides for a hearing before the civil service commission, which has power to approve the removal or reinstate the employee.

SAME. The right to a hearing before an impartial board does not change the rule that the removal of a municipal officer effected in the statutory manner is final and conclusive on the courts.

¹Reported in 81 Pac. 847.

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Opinion Per RUDKIN, J.

Appeal from a judgment of the superior court for King county, Bell, J., entered September 29, 1904, upon findings in favor of the plaintiff, granting a writ of mandate to compel the plaintiff's reinstatement as a city employee. Reversed.

Scott Calhoun and O. B. Thorgrimson, for appellants, contended, *inter alia*, that the power to remove is incident to the power of appointment, unless restricted by statute. *Easson v. Seattle*, 32 Wash. 405, 73 Pac. 496; *Trainor v. Board of Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; *Shurtleff v. United States*, 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828; *People ex rel. Brennan v. Scannell*, 70 N. Y. Supp. 983; *State ex rel. Brandt v. Thompson*, 91 Minn. 279, 97 N. W. 887. The courts have no power to review a removal made in conformity with the statutes. *State ex rel. Churchill v. Hay*, 45 Neb. 321, 63 N. W. 821; *Patton v. Vaughan*, 39 Ark. 211; *State ex rel. Keech v. Thompson*, 26 Hun 28; *State ex rel. McReavy v. Burke*, 8 Wash. 412, 36 Pac. 281; *Kimball v. Olmsted*, 20 Wash. 629, 56 Pac. 377; *State ex rel. Gill v. Byrne*, 31 Wash. 213, 71 Pac. 746; *State ex rel. Howlett v. Cheetham*, 19 Wash. 330, 53 Pac. 349.

P. D. Hughes and Fenley Bryan, for respondent, to the point that there must be a "cause" for the removal, and it must be one touching the qualifications of the officer, cited: *State ex rel. Hart v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. 595; *State ex rel. Haight v. Love*, 39 N. J. L. 14; *People ex rel. Munday v. Fire Com'rs*, 72 N. Y. 445; *State ex rel. Gill v. Common Council*, 9 Wis. 229; *State on Complaint of Kennedy v. McGarry*, 21 Wis. 502.

RUDKIN, J.—On and prior to the 31st day of October, 1903, the plaintiff was employed as a driver in the street department of the city of Seattle, in the classified civil service. On the above date he was removed by the city superintendent of streets for insubordination and neglect and re-

fusal to perform his duty. The superintendent thereupon filed with the civil service commission a statement in writing, showing his reasons for the removal, as required by § 12, of art. 16, of the city charter. Within ten days thereafter the plaintiff demanded an investigation by the civil service commission, and such demand was complied with. After such investigation the commission certified its findings and decision to the appointing officer, confirming his action in directing the removal. The regularity of these proceedings is not questioned. This action was brought against the city and the civil service commission for a mandatory injunction to reinstate the plaintiff in his former office or employment. The plaintiff had judgment below, and the defendants appeal.

It is the contention of the respondent that he was discharged for a refusal to perform more than eight hours labor for one day's pay. His particular contention is that the city required him to feed, clean, and care for the horse driven by him, mornings and evenings, in addition to his eight hours of labor, performed on the public streets. The appellants contend that it is customary for drivers and teamsters to care for their horses mornings and evenings, and that such requirement on the part of the city is not in violation of the charter provision that eight hours shall constitute a day's labor. The appellants further contend that the respondent was removed in the manner pointed out by the charter, and in strict compliance therewith, and that the courts cannot review the action of the appointing officer and the civil service commission in this proceeding. In view of the conclusion we have reached on the second question presented by the appellants, we do not deem it necessary to construe the provision of the city charter which declares that, "Eight hours shall constitute a day's work and no employee of the city, on city works, shall be required to work longer than eight hours for one day's pay."

In the absence of restraints imposed by the constitution or by statute, the power of appointment implies the power

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Opinion Per RUDKIN, J.

of removal, where no definite term is attached to the office or employment by law. *People ex rel. Griffin v. Lathrop*, 142 N. Y. 113, 36 N. E. 805; *Easson v. Seattle*, 32 Wash. 405, 73 Pac. 496. Again, where a statute or municipal charter provides that a municipal officer may be removed for cause, the proceedings for removal are judicial in their nature, and, by the weight of authority, subject to review in the courts, by proper proceedings. Under which class do the provisions in question fall? Section 8 of art. 14 of the charter of the city of Seattle, provides as follows:

"Unless otherwise provided by law or this charter, each officer, board or department authorized to appoint any deputy, clerk, assistant or employee shall have the right to remove any person so appointed."

Section 12 of art. 16 of the same charter provides as follows:

"Every officer or employe in the classified civil service shall hold office until removed or retired. Any officer or employe in such service may be removed by the appointing power only upon the filing with the commission of a statement in writing of the reasons therefor. Any officer or employe so removed may within ten days after his removal demand an investigation. The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer, and if the removal is not sustained thereby, the officer or employe so removed shall at once be reinstated. Nothing in this article shall limit the power of any officer to suspend without pay a subordinate for a period not exceeding thirty days. In the course of any investigation, each member of the commission shall have power to administer oaths, and the commission shall have the power to require the attendance of any officer or employe or other person and the production of books and papers relevant to such investigation. The provisions of this section shall not apply to the removal of the chief of police."

Had the charter stopped with the requirement that the appointing power should file with the commission a statement in writing showing the reasons for removal, the charter would

in all respects be analogous to Bal. Code, § 108, which provides that,

“Whenever the governor is satisfied that any officer not liable to impeachment has been guilty of misconduct or malfeasance in office or is incompetent, he shall file with the secretary of state a statement showing his reasons with his order of removal,”

and in such cases we are satisfied that the courts are without jurisdiction to inquire into the question of removal, except possibly the legal sufficiency of the reasons assigned. *O'Dowd v. Boston*, 149 Mass. 443, 21 N. E. 949.

The fact that another provision of the charter permits the officer or employee to demand an investigation at the hands of the civil service commission, and empowers the commission to reinstate him, does not, in our opinion change the rule. In adopting the civil service system for the purpose of securing, and retaining in its employ, competent servants, we are of opinion that the people of Seattle deemed it wise to impose no restrictions upon the power of removal, except a requirement that the reasons shall be stated in writing, and an investigation allowed by an impartial board of its own creation. In adopting a charter it was competent for the city to adopt the first rule above stated, which admits of a removal at pleasure and without cause, or the second, which only admits of a removal after a hearing and upon cause shown. In our opinion the city adopted a course midway between the two. It doubtless considered the requirement that the reasons for the removal should be stated in writing and made a matter of record a sufficient safeguard against improper removals, and an investigation by the civil service commission a sufficient protection to the discharged employee. Whether such provisions are wise or unwise is not for the consideration of this court. Where the system extends to a large number of employees, the right of every discharged employee to resort to the courts would doubtless impair, in a measure, the usefulness and efficiency of the system itself. In any

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event, we do not think that the framers of the charter ever intended that the courts should be resorted to in such cases. When, therefore, the appointing power files with the civil service commission a statement in writing showing good and sufficient reasons for the removal, and after investigation the commission confirms the action of the appointing power, the removal is complete, and any further appeal must be to public opinion. *Kimball v. Olmsted*, 20 Wash. 629, 56 Pac. 377; *State ex rel. Gill v. Byrne*, 31 Wash. 213, 71 Pac. 746.

The judgment of the court below is therefore reversed, with directions to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, and CROW, JJ., concur.

(No. 5502. Decided July 28, 1905.)

FRANK KRISCH, *Respondent*, v. THE INTER-STATE FISHERIES
COMPANY, *Appellant*.¹

CORPORATIONS—STOCK—RE-ISSUE—SALE BY CORPORATION—BENEFITS RECEIVED—ULTRA VIRES. Where a promoter subscribed for stock in a corporation, which was issued to him as fully paid up, upon a nominal consideration, and he donated it to the corporation, whose trustees authorized its sale, the corporation may sell and re-issue it as fully paid up to an innocent purchaser at 10 per cent of its par value, and after receiving the benefits of the sale, the defense of *ultra vires* is not available.

SAME—FRAUD—SALE OF STOCK—FALSE REPRESENTATIONS—LACHES OF PURCHASER—MEANS OF INVESTIGATION NOT OPEN. One who is induced to purchase stock in a corporation through the false representations of its treasurer as to its assets, debts, and business, is not, as a matter of law, chargeable with notice of the fraud, nor guilty of laches in failing to discover it during three months service with the corporation, where the means of information were not open to him, but were fraudulently operated by the corporation, and its chief business was to make fraudulent sales of its own stock.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In a case tried *de novo* on appeal, incompetent evidence will be disregarded and its admission is not ground for reversal.

¹Reported in 81 Pac. 855.

Appeal from a judgment of the superior court for King county, Honorable W. H. White, Judge *pro tempore*, entered August 8, 1904, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for deceit. Affirmed.

H. E. Foster, for appellant.

Willett & Willett, for respondent.

RUDKIN, J.—On the 16th day of November, 1903, the plaintiff in this action purchased from the defendant, through one Casedy, its treasurer and general manager, five thousand shares of the capital stock of the defendant, and paid therefor the sum of \$500. On the same day the plaintiff also entered into a contract with the defendant, through the same officer, by the terms of which the plaintiff entered the employ of the defendant and was to receive for his services the sum of \$50 per month in cash, and four hundred shares of the capital stock of the company, at an agreed valuation of ten cents per share. The plaintiff continued in the employ of the defendant under this contract until the 24th day of February, 1904, and received in all twelve hundred shares of the capital stock of the company, in part payment for his three months' services.

The plaintiff alleges in his complaint, which consists of two causes of action, that he was induced to purchase the stock and enter into the contract of employment by the false and fraudulent representations of the defendant, through its said treasurer and general manager. The substance of these representations was as follows: That the defendant had sold fourteen thousand dollars worth of its capital stock, and with the proceeds had acquired property of the aggregate value of \$13,050; that the defendant was not indebted to exceed the sum of \$180; that the business of the defendant for the six months preceding the 16th day of November, 1903, had been on a paying basis; that the defendant had \$400 in cash

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in its treasury, and that the defendant was on a dividend paying basis, had an established trade, etc. The complaint further averred that all these representations were false, and known to the defendant to be false; that the plaintiff believed them to be true, and relied upon them, and that he investigated the affairs and condition of the defendant company so far as lay within his power before he purchased the stock or entered its employ. The complaint further averred that the stock was of no value whatever, and prayed judgment against the defendant for the sum of \$620, with interest.

The answer admitted the corporate existence of the defendant, the purchase of the five thousand shares of the capital stock by the plaintiff, and the contract of employment under which twelve hundred shares of the stock were received, but denied each and every other allegation of the complaint. The action was tried before the court without a jury. The court found the facts substantially as alleged in the complaint; found that all the representations were made as alleged, that the value of the defendant's property did not exceed the sum of \$2,400, that the corporation was in debt to exceed \$1,500, that the defendant had no established trade or business, and was not, and had never been, upon a paying basis, that the business of the defendant was carried on at a loss and for the sole purpose of deceiving intending investors in its stock, and that the stock was utterly valueless. The court further found that all representations made were false, and were known by the defendant to be false; that they were made for the purpose of deceiving the plaintiff and inducing him to purchase the stock and enter the employ of the defendant; that the facts were particularly within the knowledge of the defendant's manager and not open to the plaintiff; that such means of information as were open to the plaintiff were fraudulently operated by the defendant; that the plaintiff did not learn of the true state of affairs touching such representations until a day or two before the bringing of the

action. The court rendered judgment as prayed in the complaint, and the defendant appeals.

Since the commencement of this action in the court below a receiver has been appointed for the appellant corporation. The receiver has applied for leave to intervene in this court, in order that he may move to dismiss the appeal. In view of the conclusion we have reached on the merits of the case, we will not pass on this application, and the same is denied *pro forma*.

The first assignment of error is that the complaint does not state sufficient facts, because (1) the appellant could not lawfully traffic in its own stock; (2) the respondent purchased the stock at ten per cent of its face value, and was in the employ of the appellant for three months, and was therefore chargeable with notice of the financial affairs and business of the appellant; and (3) the respondent did not act with due diligence. At the organization of the corporation the entire capital stock was subscribed by, and issued to, the promoters as fully paid up, though the consideration for such subscription was little more than nominal. Five hundred and seventy thousand shares were thus issued to the treasurer Casedy, five hundred and fifty thousand of which were by him donated to the corporation. The trustees authorized a sale of this stock, and a part thereof came into the hands of the respondent under the circumstances already stated. Assuming, without deciding, that a corporation cannot traffic in its own stock in this state, we do not think the rule was violated in this case. Whatever the rights of creditors might be as between the corporation and the subscribers, this stock was fully paid up and the corporation will not be heard to gainsay it. The corporation lawfully became the owner of this stock and had a right to sell or re-issue it. Furthermore, after receiving the benefits of the sale of the stock, the defense of *ultra vires* is not available. *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55;

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Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391;
Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370,
68 Pac. 879.

The respondent was not, as a matter of law, chargeable with notice of the fraudulent acts and conduct of the appellant and its authorized agent, and was not guilty of laches in failing to discover the fraud or prosecute his action sooner, under the facts and circumstances found by the court.

It is next assigned as error that the court admitted incompetent testimony. The case was tried without a jury, and is triable *de novo* in this court. After rejecting the incompetent testimony, if any, sufficient remains to sustain the findings of the court.

The failure to grant a nonsuit or to render a judgment for the appellant has already been answered by what we have said as to the sufficiency of the complaint. The record before us affords abundant evidence that the chief business of the appellant was to make fraudulent sales of its own stock by means little less than criminal. Its other business was a mere ruse and pretense to enable it the more easily to cheat and defraud. It would be a grave reproach to the law should this court declare that there is no redress for such wrongs.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and CROW, JJ.,
concur.

Root, J., having been of counsel for interested parties,
took no part.

(No. 5451. Decided July 29, 1905.)

ARTHUR W. COATS, *Appellant*, v. SEATTLE ELECTRIC
COMPANY, *Respondent*.¹

STREET RAILWAYS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE. The driver of a wagon, which was struck by a street car, was guilty of contributory negligence, and a nonsuit is properly directed, where on meeting an approaching car he looked back and saw another car coming from behind on the opposite track fifty or sixty yards away, but nevertheless turned out upon such track without looking to see where the car was, and was struck before he had time to get off the track.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 13, 1904, upon granting a nonsuit, dismissing an action for personal injuries sustained by the driver of a wagon struck by a street car. Affirmed.

Wooten & Welch, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, C. J.—Action for personal injuries. The plaintiff was nonsuited below, on motion of the defendant at the close of plaintiff's evidence. The facts as shown by the record are substantially as follows: The respondent operates a double line of street railway, on Jackson street, in the city of Seattle. This street runs east and west, and was paved with lumber between the outer rails of the two tracks. The remainder of the street, on each side of the railway line, was very muddy, almost impassable, so that teams traveling along the street used the portion occupied by the railway.

On the evening of December 14, 1903, at about 6:30 o'clock, the appellant was driving an express wagon drawn by one horse, east on this street, between Twentieth and Twenty-first avenues. He was following the line of track on the north or left hand side of the street. Just as he passed Twentieth avenue, he saw a car coming toward him from

¹Reported in 81 Pac. 830.

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the east, on the track on which he was traveling. He looked back and saw another car coming behind him, on the south or right hand track. This last mentioned car was fifty or sixty yards away. The distance of the car in front is not mentioned, but plaintiff says:

"I had to get out of the way, and when I saw it on the track, and just as I had pulled out on to the other track, why, the other one struck me, and I don't remember anything about it."

The night was very dark, but there were street lights at the street intersections. Appellant had used this street before, and had always driven on the street car tracks. He was about one-third of the way between Twentieth and Twenty-first avenues when he turned to cross the track. At the time he turned to cross the track he did not look to see where the car was which was coming behind him. This car struck his wagon in the rear, and injured the appellant quite severely. Appellant heard no bells or gongs sounded.

The appellant was the only witness who testified as to the manner in which the accident occurred. One witness, who was a passenger on the car which caused the injury, and who was standing on the rear platform, stated that the car was running at the time not less than twenty-five miles per hour, and that he heard no bell sounded. Another witness who was on the same car said the car was running very fast, faster than usual and there was no gong sounded. The whole of the evidence upon the question of negligence of respondent is very slight; but, assuming for the purposes of this case, that there was sufficient to go to the jury because of the excessive rate of speed of the car and because no bells were sounded, yet the respondent's own evidence shows clearly, and beyond question, that he was grossly negligent in driving his horse and wagon directly in front of the car which injured him. He knew the car was coming from behind and was near to him, yet he did not look to see where it was, and just as he pulled on to the track, and before he had time to

get off, it struck his wagon. If he had looked he could have seen that the car was upon him, and that he could not cross the track to the right without imminent danger. This case is substantially the same as *Criss v. Seattle Electric Co.*, 38 Wash. 320, 80 Pac. 525. The lower court properly directed a nonsuit.

The judgment is affirmed.

CROW, RUDKIN, FULLERTON, HADLEY, and ROOT, JJ.,
concur.

(No. 5368. Decided July 29, 1905.)

JAMES LEE, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Respondents*.¹

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—HAULING HAND-CAR BEHIND TRAIN. A bridge carpenter of six months experience in railroad work who undertakes to "hook on" or haul a hand-car behind a freight train by hand, assumes the risk of being jerked off the car, as an open and apparent one, although he acts upon the orders of his foreman, under earnest protest against so doing, and upon assurances that it was safe; since the undertaking was so extremely hazardous as not to justify his reliance upon the master's superior knowledge or to forego the risk of discharge on disobedience of the order.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 26, 1904, upon the verdict of a jury rendered in favor of the defendant by direction of the court, dismissing an action for personal injuries sustained in hauling a hand-car behind a freight train. Affirmed.

Walker & Munn, Robert Welch, and R. W. McClelland (George H. Walker, of counsel), for appellant. It is only in very rare instances where contributory negligence and assumed risk are questions of law. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Graham v. Mc-*

¹Reported in 81 Pac. 834.

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Neill, 20 Wash. 466, 55 Pac. 631, 72 Am. St. 121, 43 L. R. A. 300; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820; *Hencke v. Babcock*, 24 Wash. 556, 64 Pac. 755; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Crooker v. Pacific Lounge etc. Co.*, 34 Wash. 191, 75 Pac. 632; *Jancko v. West Coast Mfg. & Inv. Co.*, 34 Wash. 556, 76 Pac. 78; *Currans v. Seattle etc. R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87; *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204; *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597, 58 N. W. 1051, 41 Am. St. 64. The servant's duty to obey was imperative, and he had a right to rely upon assurances of safety. *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224; *Christianson v. Pacific Bridge Co.*, *supra*; *Coan v. Marlborough*, 164 Mass. 206, 41 N. E. 238; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734; *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247; *Thomas v. Raleigh etc. R. Co.*, 129 N. C. 392, 40 S. E. 201; *Thompson, Adm'r v. Chicago etc. R. Co.*, 14 Fed. 564; *Atchinson etc. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Gulf etc. R. Co. v. Newman* (Tex. Civ. App.), 64 S. W. 790; *International etc. R. Co. v. Gaitanes* (Tex. Civ. App.), 70 S. W. 101; *Bane v. Erwin*, 172 Mo. 306, 72 S. W. 522; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Chicago etc. R. Co. v. Lundstrom*, 16 Neb. 254 20 N. W. 198, 49 Am. Rep. 718.

James F. McElroy and B. S. Grosscup, for respondents.

Roor, J.—Appellant was working for respondent railway company, along its line, as a bridge carpenter, and had been so doing for a period of six months prior to the accident hereinafter mentioned. On the 5th day of December, 1901, while

engaged as aforesaid with a crew of men under the company's foreman, respondent Herndon, near a place called Deming, appellant and said crew were directed by the foreman to get upon a hand-car and "hook on" to the rear of the caboose of a freight train, to be hauled to Sedro-Woolley, another station on said railroad line. The "hooking on" was by means of two men on the hand-car catching hold of the rear of the caboose with one hand and holding to the handle bar of the hand-car with the other, and thereby pulling said hand-car along behind the train. When the foreman told appellant to do this, the latter, suspecting it to be dangerous, earnestly protested against so doing; but being assured that it was safe, and that it was necessary in order to reach Sedro-Woolley in time, as required by the company, he complied with said order. While they were so "hooked on" and being drawn along by said freight train, appellant was, by the motion of said train, "jerked or hurled" from the hand-car to the ground, sustaining serious injuries. He brought this action to recover damages therefor. The first trial resulted in a verdict in his favor. A new trial was granted. Upon the second trial, at the close of appellant's case, a challenge to the evidence, and a motion for judgment in favor of defendants, were interposed and sustained by the court. From this judgment appeal is taken to this court.

Appellant's counsel argue, with exceptional ability, that the case was one for a jury, and cite numerous decisions in support of their contention. Many of these cases, however, involved questions of contributory negligence rather than assumed risk. Theoretically there is a clear distinction between these defenses. Practically, there is sometimes a marked difference and sometimes not. The case at bar involves a question of assumed risk. The law in this state is firmly established to the effect that a servant assumes the risk of obvious and apparent dangers attendant upon his work. When appellant was told to "hook on" to the caboose, did he know, or by the exercise of ordinary intelligence and observation could

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he have known, that there was danger, in so doing, of serious injury? If this be answered in the affirmative, then it must be held that he assumed the risk of that danger.

It appears from the evidence that appellant had been working for respondent company as bridge carpenter along its railway line, for six months prior to this accident. He had done similar work elsewhere to at least some extent. Six months' experience along a railway line in operation would afford any person of ordinary intelligence a general knowledge of the movements of freight trains thereupon. The cars upon such a train are connected in such a manner that there is necessarily much "bumping" and "jerking" as the train is in motion. It is scarcely too much to say that this is a matter of common knowledge. It is certainly well known to those working upon or about railway lines where such trains are frequently passing. Such persons could not avoid perceiving these facts by the common, ordinary use of their natural faculties. Under the undisputed evidence of this case, it must be presumed that appellant knew of this "bumping" and "jerking." As his own arms and body were to form the connection between such train and the hand-car, he would know that these irregular movements of the train would frequently occasion sudden and great strains, and tend to pull him from the hand-car. This danger would be obvious to any one of ordinary perception. In the remarks of the trial court, in passing upon the challenge and motion for judgment, we find the following apt observations:

"He knew just as well as Mr. Herndon knew, just as well as anybody could know, what the palpable and ordinary result would be of a man using himself as a human coupling pin. It seems to me there cannot be any escape from it, that the ordinary and usual thing would be just exactly what has happened in this case, that somewhere along on the route of travel of that hand-car and that freight train, that there would be a sudden diminution of the speed or a sudden increasing of it, or some jar, or something of that kind, that would put him in a position of great danger."

The force of these suggestions must readily appeal to one's reason. Appellant may not have known just how he would be injured, or whether or not he would for a certainty meet with a catastrophe on that trip. But as a man of ordinary intelligence, familiar in a general way with the movements of freight trains and hand-cars, he did know that he was courting danger every moment he permitted his body to serve as a car-coupler while the train was in motion. The probability of serious injury was apparent at all times.

It is not a case of relying upon the superior knowledge of the master. However much the master or foreman knew about this danger, and however many assurances of safety he may have given, the fact remains that the danger was open, apparent, and obvious to appellant. In his complaint, appellant speaks of this service as "very hazardous." It would seem that no one could conceive of it as being otherwise. It also appears from the complaint that the foreman's reason for having the men "hook on" to the freight train was to get to Sedro-Woolley more quickly. This would indicate an understanding, such as any one might naturally have, that a freight train would travel more rapidly than a hand-car. The greater the speed of the train, the more rapid would be the movements of the handle bar on the hand-car, the more pronounced the "bumping" and "jerking" of the cars, and the greater the danger to the human coupling link. A moment's contemplation of these matters could not fail to impress appellant with the dangers of his undertaking. That he undertook this task under the orders of the foreman does not change the rule of law. A servant is always supposed to be working under orders of the master—actual or implied. Neither does the case come within the rule applicable where the servant, relying upon a promise to repair or correct a dangerous situation, acts upon the definite, distinct orders of the master at the time, and is injured while so doing.

It is argued that appellant might have been, and probably would have been, discharged if he had not obeyed the fore-

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man's command. Such is always the position of a servant. He has his choice of assuming the obvious dangers of the work and getting the compensation for his labor, or of refusing to do the work under the existing conditions and running the risk of being discharged. The law does not compel him to work for any certain person, or to obey any orders. But if he elects so to do, he thereby subjects himself to the law applicable to the *status* he thereby creates. The assumption of the risk of open and apparent dangers is imposed by law upon one occupying that *status*. The facts established by the evidence in this case are such that we do not think any reasonable mind can believe appellant not to have realized that he was running the risk of great danger when he "hooked on" to the train. In fact, his complaint alleges that he "suspected" danger and protested against the undertaking. In the light of all these facts, the action of the trial court in sustaining the challenge to the evidence and in granting judgment for defendant was correct. The case is controlled by principles recognized and established in this state by many decisions of this court. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126; *French v. First Avenue R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 783; *Robare v. Seattle Traction Co.*, 24 Wash. 577, 64 Pac. 784; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Woods v. Northern Pac. R. Co.*, 36 Wash. 658, 79 Pac. 309.

Had the case gone to the jury a verdict favorable to defendants would have been the only one legally possible. A verdict in favor of plaintiff upon such evidence could not be legally upheld. As a matter of law, the evidence defeated

plaintiff's right of recovery. There was consequently no logical or proper course for the trial court other than that adopted.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, RUDKIN, and FULLERTON, JJ.,
CONCUR.

(No. 5596. Decided July 29, 1905.)

E. L. CARLSON *et al.*, Respondents, v. THE WHITE STAR
STEAMSHIP COMPANY, Appellant.¹

SHIPPING—OWNERSHIP OF VESSEL—EVIDENCE—NAME OF COMPANY—VARIANCE. In an action against a steamship company, a prima facie case of ownership of a vessel is shown by answers to interrogatories, and by certified copies of records from the United States custom office, showing that she was registered as owned by the company, and by an admission that she had ever since been operated by the company; and any variance therein by the omission of the word "The" in the corporate name of the company is immaterial.

SAME—NEGLIGENCE—COMMON UNDERTAKING—INJURY TO SERVANT OF INDEPENDENT CONTRACTOR—MASTER AND SERVANT—VICE PRINCIPAL. The owner of a ship whose crew is engaged with the servants of a lighterage company in unloading lumber, is engaged in a common undertaking, and owes the duty to exercise care in its part of the work; and it is liable to the servants of the lighterage company for negligently sending down a heavy stick of timber, by shoving it through a porthole by hand to be received in a narrow place by an insufficient number of men, where machinery and appliances were available for handling the same with safety.

SAME—CONCURRENT NEGLIGENCE OF INDEPENDENT CONTRACTOR. In such case, the negligence of the lighterage company in not employing a sufficient number of men does not release the ship owner from liability for its own negligence.

SAME—MASTER AND SERVANT—VICE PRINCIPAL. The third officer of a vessel in charge of unloading lumber is a vice principal, and his negligence in conducting the work must be imputed to the master.

SAME—CONTRIBUTORY NEGLIGENCE. Where servants of a lighterage company were working in a narrow place, receiving lumber from a vessel, and had no voice in the matter of how it was to be unloaded,

¹Reported in 81 Pac. 838.

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they were not guilty of contributory negligence in attempting to handle, as best they could, a big stick sent down without notice in an improper manner against their protest, and which was caught and thrown about in a violent manner that they could not have anticipated.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 13, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in consolidated actions for personal injuries received by employees of a lighterage company in unloading lumber from a ship. Affirmed.

Richard Saxe Jones, for appellant.

Morris, Southard & Shipley, for respondents.

Root, J.—Two cases are consolidated for the purposes of this appeal. Respondents each brought suit against appellant for damages resulting from personal injuries sustained at the same time, while on a scow upon which appellant was discharging lumber from its steamship "Oregon," in the roadstead off Nome, Alaska. The case was tried in the superior court before the judge without a jury, and resulted in a judgment in favor of each respondent. From each of said judgments, appeal is taken.

The material facts are about as follows: A lighterage company was to receive the cargo of lumber from the "Oregon." Said lumber was being discharged upon a lighter or scow some two miles from the shore. Respondents were employed by the lighterage company and were working upon its said lighter. Appellant's officer in charge of the work of unloading, feeling that the same was not being done rapidly enough, placed two of the ship's crew upon said lighter to help receive the cargo. These men received lumber and piled it at one end of the lighter while respondents received and piled lumber at the other end. Each party so piled said lumber toward the middle of the lighter. At length there remained only a space of four to six feet unoccupied near the center of the

scow in which respondents were working. At this juncture, the men on the ship put out a heavy timber of green fir, ten by ten inches square and eighteen to twenty-two feet in length. It was so put out through the porthole, about seven feet above the deck of the lighter, being handled by eight men under the direction of the ship's third officer, in charge of said work. Respondents remonstrated against the timber being shoved down by the men, as it was too heavy for them to handle. But this remonstrance was unheeded. The timber was pushed upon the lighter and one end fell close to the ship's side. As the waves of the ocean raised and lowered the lighter, this end of the timber caught under the edge of one of the steel plates on the ship's side which caused the other end of the timber to be thrown high into the air and to fall upon the lighter—this being repeated several times—striking against and falling upon respondents, causing the injuries complained of herein. The ship was provided with steam winches, block and tackle, and all appliances sufficient to handle such timbers readily and with safety

Numerous errors are assigned, but appellant groups them in three propositions: (1) That there was no proof of ownership of the vessel, and no proof of negligence on its part; (2) that respondents were employed by an independent contractor and appellant owed them no duty; (3) that respondents were guilty of contributory negligence.

As to the ownership, respondents submitted to appellant several interrogatories, some of which, with the answers thereto, were as follows:

"Interrogatory No. 5.—During the month of August, 1903, the time the alleged cause of action set forth in plaintiff's complaint accrued, if at all, was not the steamship Oregon being operated under said register of Aug. 21, 1900, and was she not then documented in the United States Customs House at Port Townsend as being owned by the White Star Steamship Company? Answer. The steamship Oregon is being operated and has been operated ever since the 21st day of August, 1900, under a registry certificate received from the

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United States Custom House at Port Townsend, and is documented as being owned by White Star Steamship Company and was so during the month of August, 1903.

"Interrogatory No. 7.—During the month of August, 1903, did not the White Star Steamship Company, by its officers and agents receive money for and issue transportation to passengers from Seattle to Nome and from Nome to Seattle? Answer. Yes."

There was introduced in evidence a certificate of the deputy collector of customs at Port Townsend, as follows:

"Certificate of ownership of vessel. United States Customs Service, Port of Port Townsend, Collector's office, May 5, 1904.

"I hereby certify that according to the records of this office the screw steamer called the "Oregon" (19485) of Seattle, tonnage 1642, was registered at this office, August 21, 1900, and the following were her owners, viz., The White Star Steamship Company a corporation organized under the laws of the State of Washington and there is no mortgage or lien on record against said vessel in this office.

"Given under my hand and seal of office this 5th day of May, 1904, 11 A. M. Chas. Miller, Dep. Collector."

Underneath the signature, in apparently the same handwriting, are the words: "Records don't show a change in the above described ownership." A certified copy of the affidavit of Sol. G. Simpson, president of White Star Steamship Company, filed for the purpose of having the "Oregon" registered, was also introduced. This affidavit recites that the "Oregon" was owned by White Star Steamship Company. Said Simpson verifies the answer herein as president of White Star Steamship Company.

This and other evidence we think establishes at least a prima facie case as to ownership in this appellant. If there be a variance as to the word "The" as found in the title of appellant's corporate name, we deem it insufficient to justify a reversal; and we do not think the prima facie case is overcome otherwise.

To the contention that respondents were employed by an

independent contractor and that appellant owed them no duty, it may be conceded that there is no relation of master and servant alleged as between appellant and respondents, and it is true that respondents were working for somebody else. But appellant's ship crew and respondents were engaged in a common undertaking. In such a case, each party owes the other the duty of exercising ordinary care and prudence. When there are two practicable methods of doing his part of such work, one dangerous and the other safe as to the other party, a person who deliberately chooses the dangerous method and thereby injures the other party is guilty of negligence and liable for the results thereof. At the time of this accident, respondents were standing in a narrow space between the two piles of lumber. An unusually large and heavy stick of timber was shoved out of the ship. Appellant's crew had control of the manner of putting out said stick of timber. Instead of using the machinery and appliances which were available and capable of handling said timber, safely, they pushed the same out by hand, and let it drop with one end so near the ship that the catastrophe above mentioned occurred. The crew were acting under the direction of the ship's third officer. He was a vice principal of appellant, and his negligence must be imputed to it.

It is urged that the lighterage company was negligent in not having a sufficient number of men upon the scow. Be that as it may, it does not relieve appellant from the consequences of its own negligence in the premises. To the argument that respondents were guilty of contributory negligence, we may say that we do not think the evidence establishes this. Respondents did not know that such a large timber was to be unloaded until they saw it coming. They had no voice in the manner of its being discharged. Their protest was unheeded. They were in a narrow place. They undertook to handle it as best they could. That it would be dropped with one end so near the ship as to be caught and thrown about in a violent manner, was a matter which they

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would not be expecting. We cannot say that they acted differently than men of ordinary prudence would have done under the same circumstances.

Taking the evidence as a whole, we think it sufficiently appears that the negligence of appellant's agents constituted the proximate cause of respondents' injuries, and that it does not appear that negligence on their part contributed.

The judgment of the lower court is affirmed.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

(No. 5720. Decided August 1, 1905.)

THE STATE OF WASHINGTON, *on the Relation of W. H. Pelton, Plaintiff, v. E. W. Ross, as Commissioner of Public Lands, Respondent, J. M. COLEMAN, Intervener.*¹

PROHIBITION—ORIGINAL JURISDICTION OF SUPREME COURT—MANDATE—STATE LAND COMMISSIONER—SCHOOL LANDS—LEASE. The only function of an original writ of prohibition by the supreme court being the restraint of judicial or quasi-judicial power, the supreme court has no original jurisdiction to issue a writ to prevent the state land commissioner from leasing certain lands and compelling him to advertise a lease of the same for sale at public auction, notwithstanding the writ was denominated a mandate, since it is in effect a writ of prohibition as to acts not judicial in character.

SAME. The injunctive feature cannot be sustained as a necessary accompaniment of the main relief by mandamus.

PUBLIC LANDS—STATE LAND COMMISSIONER—POWERS—LEASE—INTEREST OF APPLICANT—MANDAMUS. As the commissioner of public lands acts upon applications to lease lands at his own discretion, and is under no obligation to offer lands for lease, mandamus to compel him to do so cannot be maintained by an applicant having no other interest in the land than that of the general public, such applicant not being a party beneficially interested.

Application filed in the supreme court June 10, 1905, for a writ restraining the commissioner of public lands from

¹Reported in 81 Pac. 865.

executing a lease of tide lands, and requiring him to submit the lease to sale at public auction. Writ denied.

Hughes, McMicken, Dovell & Ramsey and Vance & Mitchell, for relator. The supreme court has original jurisdiction to grant the writ. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *State ex rel. Winston v. Rogers*, 21 Wash. 206, 57 Pac. 801. The relator's application gives him a definite interest apart from that of the public, sufficient to maintain the proceedings. *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Tacoma v. Bridges*, 25 Wash. 221, 65 Pac. 186; *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77. His interest is at least equal to that of a bidder on a public contract. *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940; *Times Printing Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865; *Norton v. Roslyn*, 10 Wash. 44, 38 Pac. 878; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29. The statute contemplates an opportunity for public bidding. Laws 1899, p. 77, § 1; 1 Bouvier Law Dict., 239. The commissioner was not bound in law or morals to execute the lease arranged. Bal. Code, § 2198. It was such an abuse of discretion to refuse the higher bid as to amount to fraud in law, for which we find a parallel in the tax valuation cases. *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *Landes Estate Co. v. Clallam County*, 19 Wash. 569, 53 Pac. 670; *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *State ex rel White v. Board of State Land Com'rs*, 23 Wash. 700, 63 Pac. 532. A preference right to re-lease at the end of the term, at private sale and without competition, would violate § 11 of the enabling act, forbidding such lease for a period of more than five years, especially as applied to assignees. *Hazelwood v. Rogan*, 95 Tex. 295, 67 S. W. 80. It also grants special privileges. Const., art. 1, § 13. Any disposition for less than the "full market value" is unconstitutional. Laws 1899,

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Citations of Counsel.

p. 77, § 1; Const., art. 1, § 16; *State ex rel. Bussell v. Bridges*, 23 Wash. 82, 62 Pac. 449.

The Attorney General and A. J. Falknor, Assistant, for respondent. The relator's remedy is by appeal. *State ex rel. White v. Board of State Land Com'rs*, 23 Wash. 700, 63 Pac. 532; *Wilkes v. Hunt*, 4 Wash. 100, 29 Pac. 830. The supreme court has no original jurisdiction of the proceeding. *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506; *McNaught-Collins Imp. Co. v. Atlantic etc. Pile & Timber Preserving Co.*, 36 Wash. 669, 79 Pac. 484. An applicant for a lease acquires no vested rights in the land. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240. The rights of improvers are carefully guarded in this state. *Wilkes v. Hunt*, 4 Wash. 100, 29 Pac. 830; *Pearson v. Ashley*, 5 Wash. 169, 31 Pac. 410; *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; *Hart Lumber Co. v. Rucker*, 15 Wash. 456, 46 Pac. 728. The market value is such a sum as the property is worth in the market to persons generally. Cent. Dict., "Market Value;" *Bullard v. Stone*, 67 Cal. 477, 8 Pac. 17; *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. 51; *Wilder's Steamship Co. v. Brigantine Lurline*, 11 Hawaii 83; *Sanford v. Peck*, 63 Conn. 486, 27 Atl. 1057.

Graves, Palmer, Brown & Murphy, for intervener. The supreme court has no original jurisdiction to grant a writ of prohibition to the state land commissioner. *State ex rel. White v. Board of State Land Com'rs*, 23 Wash. 700, 63 Pac. 532; *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *McNaught-Collins Imp. Co. v. Atlantic etc. Pile etc. Co.*, 36 Wash. 669, 79 Pac. 484; *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506. The application does not confer

any interest or right in the land. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 688; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; *State ex rel. Mariner v. Grey*, 4 Wis. 396; *State ex rel. McIndoe v. Commissioners of School etc. Lands*, 6 Wis. 334; *Gough v. Dorsey*, 27 Wis. 119; *Emblem v. Lincoln Land Co.*, 94 Fed. 710; *Parker v. Lynch*, 7 Okl. 631, 56 Pac. 1082. There is a remedy by appeal, and mandamus will not lie. 3 Bal. Code, § 2142a, Laws 1901, p. 98; *State ex rel. Barbo v. Hadley*, 20 Wash. 520, 56 Pac. 29; *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Fuller v. Superior Court*, 31 Wash. 96, 71 Pac. 722; *State ex rel. Young v. Denney*, 34 Wash. 56, 74 Pac. 1021. A private citizen must show a special interest in order to enjoin a public official. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Tacoma v. Bridges*, 25 Wash. 221, 55 Pac. 181; *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77. The courts will not review the decision of the commissioner in determining the market value and the character of the improvements. 26 Am. & Eng. Ency. Law (2d ed.), 385; 23 Id., 371; *Rogers v. DeCambra*, 132 Cal. 502, 60 Pac. 863, 64 Pac. 894; *DeCambra v. Rogers*, 189 U. S. 119, 23 Sup. Ct. 519, 47 L. Ed. 734; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Ramsay v. Tacoma Land Co.*, 31 Wash. 351, 71 Pac. 1024; *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. 44; *Potter v. Randolph*, 126 Cal. 458, 58 Pac. 905; *Peyton v. Desmond*, 129 Fed. 1; *Sage v. Maxwell*, 91 Minn. 527, 99 N. W. 42; *Graham v. Great Falls Water Power etc. Co. (Mont.)*, 76 Pac. 808; *Robertson v. State Land Board*, 42 Ore. 183, 70 Pac. 614; *McFadden v. Mountain View Min. & Mill Co.*, 97 Fed. 670; *United States v. Mackintosh*, 85 Fed. 333; *Cooke v. Blakeley*, 6 Kan. App. 707, 50 Pac. 981. The intervenor's contract was accepted and complete. *Colorado Fuel & Iron Co. v.*

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Board of Land Com'rs, 14 Colo. App. 84; 60 Pac. 367; *Russ v. Telfener*, 166 U. S. 720, 17 Sup. Ct. 998, 41 L. Ed. 1177. The statute authorizes the assignment. 3 Bal. Code, § 2161, Laws 1903, p. 116; 3 Bal. Code, § 2192, Laws 1903, p. 113.

CROW, J.—Relator, in his brief, says: "This is an application for a mandatory injunction, by which it is sought to have the respondent restrained from executing a certain contract to certain described lands, and requiring him to submit the lease of said lands to public auction, and dispose of the lease to the highest bidder therefor." From this statement it will be observed that, by this application, the primary relief sought is to prevent the state land commissioner from performing certain threatened acts, and thereafter to command him to do or perform certain other acts alleged to appertain to his office or duty.

On June 1, 1901, the State of Washington leased one hundred and twenty acres of school land in Kitsap county to one Robert J. Fisher, for five years, at an annual rental of \$12. By subsequent assignments said lease was transferred to J. M. Coleman, intervener herein. On January 13, 1905, said J. M. Coleman, as such assignee, applied in writing for a re-lease of said land for five years from June 1, 1905, at \$12 per annum rental, stating that he desired said lands for camping purposes. Although said application was made in the name of J. M. Coleman, it was signed by one L. J. Coleman, his son. L. J. Coleman claims to be the attorney in fact of said J. M. Coleman, and says that all acts performed by him, whether in his own name or in that of J. M. Coleman, in reference to said land, were performed as such attorney in fact.

After said application for re-lease by said J. M. Coleman, the land commissioner's office caused said land to be appraised by one Charles A. Billings, who reported its annual rental value to be \$30. On May 25, 1905, after the return of said appraisalment, said L. J. Coleman made a second ap-

plication for a re-lease for five years, claiming improvements to the value of \$120. With reference to said second application, respondent shows that, at the time of the filing of the same, an offer of \$30 annual rent was made by said L. J. Coleman to meet the appraised valuation, and the first year's rental was deposited.

On May 31, 1905, the relator made written application to the state land commissioner to lease said land for five years, offering to pay a rental of one dollar per acre, or \$120 per annum. At the time of making this application, he also deposited with the state land commissioner \$130, of which \$120 was for the first year's rental and \$10 to cover the expense of advertising, etc. At the time of making said written application, relator also filed a written protest or statement, alleging that the improvements mentioned in the L. J. Coleman application had not been made in good faith; that their erection had been commenced by him on Sunday, May 28, 1905, just prior to the expiration of the existing lease, for the sole purpose of enabling him, as prior lessee, to claim ownership of improvements upon said land and avail himself of the benefits of 3 Bal. Code, § 2160, Laws 1899, p. 77.

Respondent by letter promptly notified said L. J. Coleman of said application and protest, and in so doing, said:

"It will be necessary for you to meet this bid, under the interpretation of the law and the practice of this office. Upon receipt of an additional \$90, which together with \$30 now on deposit in this office, covers the amount of the bid of Mr. Pelton, also the reply to the protest, the matter will be given consideration, and you will be notified of the result."

Respondent also took the precaution of seeking and acting upon the advice of the attorney general. Said L. J. Coleman immediately remitted to the state land commissioner the additional \$90, and also filed his affidavit relative to the improvements, controverting the statements of relator, without stating, however, when said improvements were made.

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Thereupon, after examination and consideration of the affidavits and applications, and having satisfied himself that said improvements were *bona fide* and such as entitled Mr. Coleman as a prior lessee to a preference right to re-lease, and deeming said annual rental of \$120 sufficient and for the best interests of the state, respondent accepted said offer of \$120, notified the attorney of said J. M. Coleman, and also the attorneys of said relator of his action, and caused to be recorded in volume 2 of the lease records of his office the following: "Kitsap County. Lots 1 and 2, Sec. 36, Tp. 21, 2 East, area 120 acres, name of lessee, J. M. Coleman, postoffice address Seattle, Washington, date June 1, 1905, amount per annum \$120;" and indicated the lease as No. 7144, and caused original and duplicate leases to be prepared ready for signature.

Thereafter, but prior to the signing or delivery of said lease, on June 7, 1905, respondent received from one W. P. Trimble, not a party to this proceeding, the following telegram: "For five-year lease upon lots 1 and 2, Sec. 36, Tp. 24, north of range 2 east, I will give \$1,200 per year rent, and am prepared to raise this if it is met." On June 10, 1905, said W. P. Trimble presented a written application to lease said property for five years at \$1,200 per annum, accompanying the same by a check for \$1,200 for the first year's rental. In response to said telegram and application, respondent by letter notified said Trimble of his previous action in the premises and, *inter alia*, said: "The state feels that, since it has gone so far as it has in re-leasing, it cannot honorably recede from its position. We therefore respectfully return your check and reject your application. The office, however, will defer action for a reasonable time so that you may take such action as you wish." As the merits of this case will not be discussed, it is only justice for us to state that no suggestion of improper or fraudulent conduct on the part of the state land commissioner has been made by any of the parties; nor does anything appear which would sub-

ject him to criticism, the entire record showing that he has constantly endeavored to act honestly and in good faith.

The state land commissioner having given to said W. P. Trimble the notice above mentioned, and having temporarily preserved the status so that the parties might take any action they deemed proper, the relator, on June 23, 1905, filed this application and, on the hearing, said J. M. Coleman was, by consent, permitted to intervene. Respondent and the intervener have each submitted a demurrer and answer to the affidavit of relator. The demurrers present several questions, of which we will consider two: (1) That this court has no original jurisdiction of this proceeding; (2) that the relator has no right or authority to institute this proceeding.

(1) While the relator seeks to invoke the original jurisdiction of this court, and in so doing has ostensibly applied for a writ of mandate, we will first consider the objects sought to be obtained by said writ, in order that its true character may be determined. It is evident that the primary relief sought by relator would, if granted, in substance amount to an order either prohibiting or enjoining respondent from delivering the proposed re-lease to the intervener Coleman. In other words, it is sought by an original application here to secure some writ by which the re-leasing of said land to the intervener may be prevented. Unless some steps are taken to prevent such re-leasing, it would be idle to entertain the idea that this court could be called upon to issue a writ of mandamus directing the state land commissioner to advertise a lease of said land for sale at public auction to the highest bidder. Before any such order could be made, the re-lease or pretended re-lease to Coleman should most certainly be disposed of or prevented. We therefore think, from the primary relief sought by relator herein, that the writ he asks is not one of mandamus, but is in the nature of a writ of prohibition directed to the state land commissioner, forbidding him to do an act which is not judicial in its character. While it is true that this court has original

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jurisdiction to issue writs of prohibition in certain cases, it has been repeatedly held by us that the only function of such a writ is the restraint of unauthorized judicial and quasi-judicial power. *State ex rel. White v. Board of State Land Com'rs*, 23 Wash. 700, 63 Pac. 532; *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780. The acts of respondent which relator seeks to prevent are not judicial or quasi-judicial, as in re-leasing to Coleman he acts only in a ministerial or executive capacity. If the relator desires to prohibit or enjoin respondent from re-leasing to Coleman, and is entitled to do so, he should proceed in the superior court, as we are without original jurisdiction to grant such relief by a writ which in its effect would be a writ of prohibition, although relator undertakes to give it some other title.

It is suggested by relator, however, that the original injunctive relief sought here is merely a necessary accompaniment of the main relief which can be granted by a writ of mandamus. We do not think this contention can be sustained. If we eliminate all idea of prohibitive or injunctive relief herein, it would be absurd for this court to issue a writ of mandamus against the state land commissioner, compelling him to lease lands which have already been released or the title to which would be, at least, clouded by an existing pretended re-release. As above suggested, relator primarily seeks to prohibit or enjoin respondent from doing certain acts. This he cannot do by a writ of mandamus. "Mandamus will not lie to undo what has already been done. Mandamus is a writ to compel and not to restrain action." 19 Am. & Eng. Ency. Law (2d ed.), 743. See, *Legg v. Mayor etc. of Annapolis*, 42 Md. 203; *Dunklin County v. District County Court*, 23 Mo. 449. In the case last mentioned, which is quite similar in principle to this, the supreme court of Missouri says:

"The writ of mandamus is in form a command in the name of the state, directed to some tribunal, corporation, or public officer, requiring them to do some particular thing

therein specified, and which the court has previously determined that it is the duty of such tribunals or other person to perform. . . . It does not lie to correct the errors of inferior tribunals by annulling what they have done erroneously, nor to guide their discretion, nor to restrain them from exercising power not delegated to them; but it is emphatically a writ requiring the tribunal or person to whom it is directed, to do some particular act appertaining to their public duty, and which the prosecutor has a legal right to have done."

"The writ of mandamus is the counterpart of the writ of prohibition, and is so designated in some states by statute. Mandamus is a legal remedy to compel action in accordance with legal duty, while prohibition is a legal remedy to restrain action in excess of legal authority." 19 Am. & Eng. Ency. Law (2d ed.), 721, 722.

See, also, 23 Am. & Eng. Ency. Law (2d ed.), 196; Bal Code, § 5769; *State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764. Relator claims the action of respondent in re-leasing to the intervener is an act in excess of legal authority, and he seeks to prohibit such action. If it be conceded that he also seeks a writ to compel action by respondent in accordance with an alleged legal duty, then in one and the same proceeding he is demanding from this court an original writ having two functions, one of which is the counterpart or converse of the other. We think this cannot be done.

(2) It is contended by the respondent and the intervener, we think properly, that the relator has not a sufficient special interest in the land in controversy to authorize him to apply to this court for a writ of mandamus compelling respondent to offer a lease of said land for sale to the highest bidder at public auction. It is true, he has filed an application which has been rejected, and that respondent has in effect refused to offer a lease of said land for sale at public auction; but the mere filing of a written application for a lease of public lands does not confer upon the applicant any interest in the

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land other than that of the general public. *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Frisbie v. Whitney*, 9 Wall. 187; *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9; *State ex rel. Mariner v. Gray*, 4 Wis. 380.

Relator contends that, under the constitution and laws of this state as applied to the facts herein, the intervener Coleman has no preference right to a re-lease. While we now express no opinion as to Coleman's rights in that regard, still were we to concede the relator's position to be correct, what would be the result? The land would be then subject to original lease only. Bal. Code, §§ 2149-2156. These sections impose upon respondent no immediate official obligation or duty to offer such land for lease even after applications are made. He exercises his own judgment in the premises, acting as he deems advisable. Bal. Code, § 2150. When such lands have been actually offered, he may reject any or all bids. Bal. Code, § 2156. We fail to see, therefore, how the relator has secured any special right or interest in the land in question entitling him to a writ of mandamus, even though it be conceded that he is seeking relief by mandamus and not by prohibition. A writ of mandamus can be issued only on affidavit on the application of the party beneficially interested. Bal. Code, § 5756; Spelling, Injunctions etc. (2d ed.), §§ 1369, 1370.

It is ordered that the relator's application be dismissed.

MOUNT, C. J., ROOT, HADLEY, RUDKIN, and DUNBAR, JJ., concur.

FULLERTON, J., took no part.

(No. 5635. Decided August 1, 1905.)

EUGENE BUCHANAN, *Appellant*, v. PHILIP LABER *et al.*,
Respondents.¹

APPEAL—REVIEW—NEW TRIAL—AFFIDAVITS. Upon appeal from an order granting a new trial, the supreme court will not consider an affidavit that was struck out at appellant's request.

NEW TRIAL—JURY—MISCONDUCT—PARTY TREATING A JUROR. A new trial is properly granted for misconduct of a juror where it appears that, during the progress of the trial, he engaged in private conversations, and drank in a saloon, with a party to the suit.

SALES—WARRANTY—EVIDENCE BY PAROL TO VARY WRITING. Evidence of an oral warranty of a gasoline engine is not admissible where it was sold by a written contract referring to a printed catalogue for the terms of the warranty, which must control, and cannot be varied by parol.

SALES—WARRANTY—WAIVER—QUESTION FOR JURY. In an action for breach of warranty on the sale of an engine it is not necessary to show notice to the manufacturer of defects within five days as provided in the contract, where the evidence tends to show a waiver of the notice, making the waiver and warranty questions for the jury.

Appeal from an order of the superior court for Lincoln county, Chapman, J., entered February 6, 1905, setting aside the verdict of a jury rendered in favor of the plaintiff, and granting a new trial. Affirmed.

H. N. Martin and *J. T. Mulligan*, for appellant.

H. A. P. Myers, for respondents.

HADLEY, J.—This is an action to recover the contract price of a gasoline engine which, it is alleged, was sold by the plaintiff to the defendants. The answer alleges that the defendants ordered of plaintiff one twelve horse-power Flour City traction engine, and that the same was afterwards delivered to them at Creston, Washington; that the engine was warranted by the plaintiff to be built of good material and capable of developing twelve horse-power at all times when in use; that it was not capable of developing said amount

¹Reported in 81 Pac. 911.

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of power; that it was not built of good materials as warranted, and that the materials were put together in an unworkmanlike manner; that it constantly leaked gas and was of no value whatever; that the defendants notified plaintiff that they desired a test made of the engine before accepting it, and that in response thereto the plaintiff and an expert, an employee of the manufacturer, went to Creston to make such test; that the test failed to prove that the engine was capable of developing twelve horse-power, and that both the plaintiff and the expert there admitted that it was defective; that it leaked gas and was not up to the standard called for by the warranty. The material averments of the answer are put in issue by the reply. The cause was tried before a jury, and resulted in a verdict for the plaintiff. The defendants moved that the verdict be set aside and for a new trial. The motion was granted, and the plaintiff has appealed.

It is assigned that the court erred in setting aside the verdict and granting a new trial. Affidavits were submitted in support of the motion for new trial, to the effect that during the trial one of the jurors was on several occasions engaged in conversation with the appellant when no others were present; that after the evening meal of the day on which the trial was finished, the appellant and said juror drank together at the bar of the Vendome hotel; that about noon of the same day the appellant and both respondents had taken a drink at said bar, and that appellant, seeing said juror in the lobby of the hotel, called to him, and in response thereto the juror came into the bar room and appellant then treated him to a drink, and paid for the same; that this was done without the suggestion or consent of respondents.

Respondents also call our attention to another affidavit made by a juror to the effect that, after the verdict had been signed by the foreman as a sealed verdict, about eleven o'clock at night, the jury separated, and nine or ten of them

were then treated to drinks by appellant's counsel and in appellant's presence. A motion was made to strike this affidavit, on the alleged ground that it tended to impeach the verdict. The court filed a written opinion in deciding the motion for new trial, and referred to matter contained in the juror's affidavit as though it might have been considered with the rest of the affidavits. Later, however, an additional written opinion was filed, to the effect that the court had overlooked the motion to strike the juror's affidavit, and the motion to strike it was granted. But the court stated that the decision by which the new trial was granted was not based upon that affidavit. The juror's affidavit is therefore not before us for consideration, since it was stricken at appellant's request, and the appeal of the latter does not bring that subject here for review. In view, however, of what is contained in the affidavits that were considered, we shall not interfere with the discretion exercised in the granting of the new trial.

Appellant contends that affidavits in the record show that the juror first mentioned, who conversed and drank with appellant, was of such established good character in the community that he could have been in no sense influenced thereby. Influences are, however, often subtle and may unconsciously affect the verdict of a juror. The verdict should be free from the taint of even suspicion that it resulted from undue influence. The impropriety of the conduct of the juror and appellant is manifest. In *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474, the plaintiff and one of the jurors played at cards and drank together in a saloon. They also walked together and conversed with each other. The court, in that case, said:

"Such conduct upon the part of the plaintiff and the juror was reprehensible in the extreme. Instead of seeking each other's society they should rather have avoided it. Trials of causes should have the appearance of fairness, and it

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would tend greatly to bring judicial proceedings into disrepute if matters of this kind should be overlooked or tolerated."

It is, however, urged that the court should have discharged the jury and rendered judgment for appellant at the close of the respondents' case, and that, without regard to the matters considered on the motion for new trial, the judgment which was entered upon the rendition of the verdict was right and should not have been set aside. This contention is based upon the alleged ground that a verdict in favor of respondents could not have been sustained within the issues, and under the competent evidence in the case. It is asserted that the warranty of the engine was contained in a written contract, and that the evidence showed that respondents had not complied with the terms of the contract in regard to giving notice of defects in the engine. The respondents alleged in general terms that appellant warranted the engine and did not confine their allegations to a written warranty. The court ruled that, under the broad allegations of their pleading, they were entitled to show any warranty which was made, either written or parol. But appellant points out that the written contract between the parties had been admitted in evidence without objection; that it was not in dispute, and that upon its face it referred to a certain catalogue, published by the manufacturer, for the terms of the warranty; that it was therefore written, and that the evidence of a parol warranty was improperly admitted. This contention must be sustained under the following stated rule:

"A warranty, however, is no exception to the general rule excluding parol evidence offered to vary the terms of a written contract. If the contract of sale is in writing, its terms are conclusive as to the existence and the extent of express warranties made before or at the time of the sale, and evidence of prior or contemporaneous verbal agreements or representations is not admissible for the purpose

of proving other or different warranties; the parties are presumed to have included in the written instrument all the terms of their agreement." 30 Am. & Eng. Ency. Law (2d ed.), 168.

We must therefore refer to the published catalogue for the terms of the warranty. It clearly warrants the engine to be built of good material and to be capable of developing the horse-power mentioned in the contract between the parties, viz., twelve horse-power. It provides that, after written notice to the manufacturer of defects in the engine, reasonable time shall be allowed to remedy the defects and apply certain tests as to the power it may develop. And it also contains the following clause:

"Continued possession of the engine for five days without complaint being made direct to the Kinnard-Haines Co., at its factory in Minneapolis, Minnesota, by registered letter, shall be sufficient evidence that this warranty is fulfilled."

Appellant contends that respondents failed to show that they gave notice in accordance with the above, and that by the express terms of the contract the warranty was therefore fulfilled. There was evidence, however, tending to show that appellant waived that provision of the contract, and it therefore became a question for the jury to determine whether it was waived, and if so whether the engine was up to the standard of the warranty.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, ROOT and DUNBAR, JJ., concur.

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Syllabus.

(No. 5554. Decided August 1, 1905.)

LEE KIRKHAM, *an Infant, by his Guardian ad Litem, J. D.*
Kirkham, Respondent, v. THE WHEELER-
*OSGOOD COMPANY, Appellant.*¹

DAMAGES—FUTURE PAIN AND SUFFERING—PERMANENT INJURY—INSTRUCTIONS. Future pain and suffering from the mangling of a hand is a matter of such common knowledge that a recovery therefor is warranted without evidence thereof aside from the injury itself.

SAME—ERROR CURED BY SUBSEQUENT INSTRUCTIONS. An instruction authorizing a recovery for such future pain and suffering as the plaintiff may endure as the ordinary and actual result and as a consequence of the injury is not prejudicial error in that it fails to limit the recovery to such future pain and suffering as would reasonably and probably flow from the injury, especially in view of an instruction that under no circumstances should an unreasonable or excessive verdict be returned.

MASTER AND SERVANT—CHILD LABOR—FACTORY ACT—CONSTRUCTION. The factory act, Laws 1903, p. 261, providing that children under fourteen years of age shall not be "hired out" is intended to forbid their employment, as well as hiring out by parents, and the prohibition extends to all connected therewith, making the employment itself illegal.

MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE OF TENDER YEARS—WARRANTY—INSTRUCTIONS. In an action for personal injuries sustained by an employee twelve years of age, a charge to the jury that it is not enough to give general instructions as to dangers, but that they should have been such as to satisfy a careful person that he was familiar with the exact danger, is not objectionable taken as a whole, as assuming as a matter of law that general instructions are not sufficient.

SAME—DUTY TO PROTECT. A disconnected portion of a charge to the jury to the effect that defendant owed the duty to protect plaintiff from risks which one of his age did not properly appreciate, may not be objectionable as an assumption that he did not appreciate the dangers.

SAME—DEGREE OF CARE. In an action for personal injuries sustained by an employee twelve years of age, who had had no experience in a factory, an instruction that the degree of care owed by the defendant is much greater than is due an adult is not prejudicial, especially where the degree of care was afterwards correctly stated.

¹Reported in 81 Pac. 869.

SAME. An instruction, informing the jury as to the facts and circumstances that they might take into consideration in determining the degree of care required, is not open to the objection that it gives no rule for the guidance of the jury, when the court declared that the ordinary care required was such as an ordinarily prudent person would use under the circumstances.

SAME—CONTRIBUTORY NEGLIGENCE. A charge on the subject of contributory negligence, that the burden of proof is upon the defendant to prove that the plaintiff was injured by his own negligence, and not by the negligence of the defendant, does not limit the defense to cases where defendant is not negligent, when explained by a fuller correct explanation of contributory negligence.

MASTER AND SERVANT—CHILD LABOR—FALSE REPRESENTATION OF MINOR AS TO AGE—ESTOPPEL IN PARS. In an action for injuries to a child under fourteen years of age, employed contrary to the provisions of the factory act, it is no defense that the child represented himself as being over fourteen, since estoppel *in pars* growing out of contracts does not operate against a minor.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 12, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries (the mangling of a hand in a sticker machine) sustained by a boy employed in a factory, contrary to the provisions of the factory act. Affirmed.

Hudson & Holt, for appellant. The instruction as to future loss and suffering was bad because not properly limited to such as was "reasonably certain" to result. *Watson*, Damages, pp. 363-365, 384; *White v. Milwaukee City R. Co.*, 21 Wis. 536, 21 N. W. 524, 94 Am. Dec. 562; *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183, 61 N. W. 771; 15 Cent. Dig., col. 1957; 13 Cyc. 138, 139; *Raymond v. Keshburg*, 91 Wis. 191, 64 N. W. 861; *Fry v. Dubuque etc. R. Co.*, 45 Iowa 416; *Ross v. Kansas City*, 48 Mo. App. 440; *Ayers v. Delaware etc. R. Co.*, 158 N. Y. 254, 53 N. E. 22; *Ohio etc. R. Co. v. Cosby*, 107 Ind. 32, 7 N. E. 373; *Kucera v. Merrill Lum. Co.*, 91 Wis. 637, 65 N. W. 374; *Curtis v. Rochester etc. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Smith v. Milwaukee Builders' etc. Exchange*, 91 Wis. 360, 64 N.

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Citations of Counsel.

W. 1041, 51 Am. St. 912, 30 L. R. A. 504. The employment of a minor is not negligence *per se*. 1 Labatt, § 18; *Youll v. Sioux City etc. R. Co.*, 66 Iowa 346, 23 N. W. 736; *Buckley v. Gutta-Percha etc. Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717; *O'Keefe v. Thorne* (Pa. St.), 16 Atl. 737. The statute is to be strictly construed. *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; 26 Am. & Eng. Ency. Law (2d ed.), 661, 662, Endlich, Interpretation of Statutes, § 76; *Prescott etc. R. Co. v. Atchinson etc. R. Co.*, 73 Fed. 438; *Barry v. Snowden*, 106 Fed. 571. The presumption is that words were used in their popular sense. 26 Am. & Eng. Ency. Law (2d ed.), 625; Endlich, Interpretation of Statutes, § 76; *Corning v. Board of Com'rs*, 102 Fed. 57. It is not competent to "beg the intent" of a statute. *Northern Pac. R. Co. v. United States*, 36 Fed. 282. Accordingly employment is not forbidden by the provision that a child shall not be "hired out." 26 Am. & Eng. Ency. Law (2d ed.), 654. It is an encroachment upon the province of a jury to charge that it was not enough to give "to one of his age general instructions as to the dangers, but the instructions should have been such as would have satisfied," etc., since it assumes that the instructions given were not sufficient, because they were not such as would satisfy a reasonably prudent person, etc. This was a manifest instance of an instruction on the weight of the evidence. *Boyer v. Northern Pac. R. Co.*, 27 Wash. 707, 68 Pac. 348; 1 Labatt, § 252; *Probert v. Phipps*, 149 Mass. 258, 21 N. E. 370; *McDougall v. Ashland Sulphite-Fibre Co.*, 97 Wis. 382, 73 N. W. 327; *Reynolds v. Boston etc. R. Co.*, 64 Vt. 66, 24 Atl. 134, 33 Am. St. 908; *Bibb Mfg. Co. v. Taylor*, 95 Ga. 675, 23 S. E. 188. An infant as well as an adult is charged with notice of dangers. *Luebke v. Berlin Mach. Works*, 88 Wis. 442, 60 N. W. 711, 43 Am. St. 913; 1 Labatt, § 398. The breach of statutory duty does not take away the defense of contributory negligence. 2 Labatt, p. 2203; *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32

S. W. 460, 49 Am. St. 935, 30 L. R. A. 82; 1 Thompson, Negligence, p. 506; 2 Id., p. 1175; Bishop, Non-Contract Law, § 140; *Evans v. American Iron & Tube Co.*, 42 Fed. 519; *Krause v. Morgan* (Ohio St.), 40 N. E. 887; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hayes v. Bush etc. Mfg. Co.*, 102 N. Y. 648, 5 N. E. 784; *Tvedt v. Wheeler*, 70 Minn. 161, 72 N. W. 1062; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 49 Am. St. 935, 30 L. R. A. 82; *Brower v. Locke*, 31 Ind. App. 353, 67 N. E. 1015; *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908.

Govnor Teats, for respondent, contended, *inter alia*, that the purpose of the factory act is to prevent the employment of child labor. *Tvedt v. Wheeler*, 70 Minn. 161, 72 N. W. 1062; *Christiansen v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 N. W. 826, 85 Am. St. 440; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Perry v. Tozer*, 90 Minn. 431, 97 N. W. 137, 101 Am. St. 416; *Ornamental Iron & Wire Co. v. Green*, 108 Tenn. 161, 65 S. W. 399; *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 49 Am. St. 935, 30 L. R. A. 82. The defense of contributory negligence should not apply. *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908; *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572. Defendant's duty was to instruct as to the dangers. *Shearman & Redfield*, Negligence (5th ed.), § 219; *Cooley*, Torts (2d ed.), p. 652; *Bailey*, Master's Liability, p. 114; 4 Thompson, Negligence, §§ 4091-4103; *Fitzgerald v. Alma Furniture Co.*, 131 N. C. 636, 42 S. E. 946; *Cleveland Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 20 N. E. 466, 15 Am. St. 596, 3 L. R. A. 385.

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RUDKIN, J.—On and prior to the 8th day of January, 1904, the defendant owned and operated a factory for the manufacture of sash, doors, mouldings, etc., in the city of Tacoma. On the 10th day of December, 1903, the plaintiff, an infant of the age of about twelve years, entered the employ of the defendant. Up to the 6th day of January, 1904, the plaintiff and his elder brother were engaged in tying up siding in a shed adjacent to the factory. On or about January 6th, they were transferred to the factory to point pickets and tie them into bundles. In close proximity to the place where the plaintiff was at work, was a sticker machine, used in the manufacture of pickets. On the last named date, a sliver became fast in the sticker machine and, while the operator's back was turned, the plaintiff attempted to remove it. In doing so his hand came in contact with the rapidly revolving knives in the head of the machine, causing the loss of the third and fourth fingers and a portion of the hand. The plaintiff had nothing to do with the operation of the sticker machine, and it was no part of his duty to remove the sliver therefrom. This action was brought to recover damages for the injuries so received.

The complaint alleged negligence on the part of the defendant, in putting the plaintiff at work in a dangerous place, without proper instructions, and without warning him against the dangers by which he was surrounded and to which he was exposed, and also negligence in employing the plaintiff in violation of the act of March 16, 1903, entitled, "An act to regulate the employment of child labor and to prohibit the employment of females under the age of eighteen years as public messengers and fixing a penalty for the violation thereof." Laws 1903, p. 261. The answer, in addition to the denials, alleged affirmatively contributory negligence on the part of the plaintiff, and that the plaintiff at the time of his employment represented that he was fourteen years of age. The case was tried before a jury

and resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Numerous errors are assigned by the appellant, all of which are discussed under six general heads, and we will consider them in the same order. The first error assigned relates to instructions as to future suffering and loss. The court instructed the jury that, if they found for the respondent, they might take into account the pain and suffering the respondent had endured and may endure as the ordinary and actual result, and as a consequence of the injury sustained. The first objection to this instruction is, that there was no evidence as to future pain and suffering, and that the question should not have been submitted to the jury. It is true, there was no evidence to speak of as to future suffering or pain, aside from the nature of the injury itself. But a hand, mangled as this was, is subject to injury and consequent pain through life, where an uninjured member would not be affected, and we think this is so far a matter of common knowledge that the court would not be warranted in withdrawing the question of future pain and suffering from the jury. Like the question of the permanency of the injury, the injury in this case speaks for itself. It was further objected to this instruction that the court did not confine the jury to such pain or suffering as would reasonably or probably flow from the injury complained of. We do not think this objection is tenable, especially in view of the fact that the court instructed the jury that under no circumstances should an unreasonable or excessive verdict be returned.

The next assignment is, that the court erred in its instructions as to the child labor act of 1903, *supra*. This contention of the appellant is based upon the language of the act which declares that no child under the age of fourteen years shall be *hired out* in any factory, etc. It is contended that a child can only be *hired out* by the parent or guardian, and that the prohibition against the employment

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does not therefore extend to the employer. This contention cannot be upheld. The manifest purpose of the act is to prohibit the employment of children in certain places, and the prohibition extends to all parties connected with the employment. The employment as well as the hiring out, is forbidden. An employer who knowingly employs or keeps in his employ a minor within the prohibited age, is guilty of a violation of the statute, and the employment itself is illegal. In the case at bar the minor was employed without the intervention of either parent or guardian, and if we adopt the views of counsel the act punishes only the child himself, the very person whom it sought to protect. It is needless to say we can adopt no such construction.

The next assignment relates to instructions on the weight of the evidence. In speaking of the instructions which it was incumbent on the appellant to give the respondent on entering its employ, the court said:

"You are instructed that it was not enough to give the plaintiff or one of his age general instructions as to the dangers, but the instructions to the boy should have been such as would have satisfied a reasonably prudent and careful person that he was familiar with the exact danger that would be likely to befall a boy of his age, while working around the place where he was injured."

Counsel criticise that portion of the instruction which is to the effect that general instructions are not sufficient. As an abstract statement this portion of the charge may not be correct. Instructions are required for a particular purpose and, if they are sufficient to satisfy the requirements of the law in that regard, it matters not whether they are general or special. While it cannot be said as a matter of law that general instructions are not sufficient, yet, when we take this statement in connection with what follows, we think the instruction as a whole fairly states the law.

The court further instructed the jury that, "It was the duty of the defendant to use ordinary care to protect him

[the plaintiff] from risks which one of his age did not properly appreciate, and to which dangers plaintiff ought not to be exposed." It is claimed by the appellant that the court informed the jury by this instruction that the respondent was not capable of appreciating the risks and should not have been exposed to them. The above quotation is a disconnected portion of a sentence, and when the instruction is taken as a whole it is not open to the criticism urged against it.

Again, the court instructed the jury that, "The degree of care due by the defendant to the plaintiff or to one of tender years is much greater than is due to an adult." The degree of care required in either case is dependent entirely upon circumstances. It may be gross negligence on the part of a master to employ either a minor or an adult, without experience, in a dangerous place, without fully instructing him as to the dangers to which he is exposed. On the other hand, it may not be negligence to employ either, without any instructions whatever. It depends entirely upon the nature of the employment and the surroundings. A minor may be of such tender years that a court can declare as a matter of law that his employment is negligence, but independent of statute, the employment of a minor is not ordinarily negligence *per se*. In determining the question of negligence, the jury must take into consideration the minor's age, his experience, his intelligence, the nature of his surroundings, the dangers to which he is exposed, and all the attendant circumstances. It is often said by text-writers and by courts that the law exacts a greater degree of care in the employment of a minor than of an adult, and this, as a general rule, is true. But its bare statement conveys but little information to a jury. Where the plaintiff is a minor, the court is not required to instruct the jury as to the degree of care required in the employment of an adult, the jury are not themselves informed on that subject, and to compare the degree of care required in a given case, in which it is

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the duty of the court to fully inform the jury, with the degree of care required in a case not before them, and in regard to which they are presumed to be equally ignorant, does not tend to enlighten them, to say the least. In this case, however, the respondent was an infant of about twelve years of age, without experience in mills or factories, and the statement of the court that the law required a much higher degree of care in his case than in the case of an adult is not prejudicial, especially in view of the fact that the degree of care required in the respondent's case was afterwards correctly stated to the jury.

The next error assigned relates to instructions as to the degree of care required of the respondent. In support of this assignment it is urged that the court informed the jury as to the different facts and circumstances that might be taken into consideration in determining the degree of care required of the respondent, but laid down no rule for their guidance. The court instructed the jury that the respondent was required to use ordinary care to avoid injury, that is, such care as an ordinarily prudent person would use under the facts and circumstances shown by the evidence, taking into consideration his age, capacity, knowledge, and experience. There is therefore no merit in this assignment.

On the question of contributory negligence, the court instructed the jury as follows:

"The jury are instructed that as to the defenses made by the defendant in its answer, the burden of proof is upon the defendant; that is to say, the defendant must prove by a fair preponderance of testimony that the plaintiff was injured by his own negligence, and not by the negligence of the defendant."

It is urged that this instruction is erroneous because it limits the defense of contributory negligence to a case in which the plaintiff is negligent and the defendant is not. The above instruction was explained by the following:

"An employee is bound to exercise that degree of care

which a reasonably prudent person of his age, judgment, and experience would use in order to avoid being injured. Where an employee fails to exercise the care which is required of him and is injured, when if he had employed the proper degree of care he would not have been injured, such employee is said to be guilty of contributory negligence. If you find in this case that the plaintiff was guilty of contributory negligence you must find for the defendant."

Waiving the question whether this definition of contributory negligence is technically correct, taking the two instructions together, the jury could not have been misled.

It is lastly assigned as error that the court refused to instruct the jury that, if the respondent at the time of his employment represented that he was fourteen years of age, he is now estopped to deny it. It is true, as claimed by counsel, that infants are liable for their torts; that is, for pure torts, such as injuries to person or property. On the other hand, by the great weight of authority, infants are not liable for torts connected with or growing out of contracts, and the doctrine of estoppel *in pais* does not apply to them. 16 Am. & Eng. Ency. Law (2d ed.), pp. 307, 308; Field, Law of Infants, § 17; *Sims v. Everhardt*, 102 U. S. 300. In the last case cited, the supreme court of the United States says:

"The question is, whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity."

A careful examination of the record in this case discloses no reversible error, and the judgment is therefore affirmed.

MOUNT, C. J., HADLEY, ROOT, CROW, FULLERTON, and DUNBAR, JJ., concur.

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Citations of Counsel.

(No. 5670. Decided August 2, 1905.)

39 425
39 500

DORA MARSH DRASDO, *Appellant*, v. FRANK JOBST *et al.*,
as Executors, etc., of Paul Drasdo,
*Deceased, Respondents.*¹

EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—PENDENCY OF LITIGATION—JURISDICTION. An objection to the jurisdiction of the court to settle the final account of executors, because of the pendency of appeals in the supreme court in litigation concerning the distribution of the property, is unavailing, where at the time of the hearing in the supreme court such appeals have been finally determined.

SAME—FINDINGS—RECITALS—SEPARATE CHARACTER OF PROPERTY—FORMER ADJUDICATION IN COURSE OF ADMINISTRATION—FINALITY. Upon the final distribution of an estate, error cannot be predicated on recitals in the findings as to the separate and community character of the property, and the findings cannot be reviewed, where that matter had formerly been determined in the course of administration in special proceedings for the purpose, and the findings made no change in that respect.

SAME—DEBTS—FINDINGS. A finding upon the final settlement of the estate that there are no debts, is sustained where the evidence showed no debts except funeral expenses and the costs of administration, and the only bill presented was disallowed.

Appeal from an order of the superior court for King county, Bell, J., entered January 4, 1905, upon findings in favor of executors, after a hearing upon the merits, settling their final account and making distribution of the estate.

C. H. Farrell and Piles, Donworth, Howe & Farrell, for appellant, contended, among other things, that the court has no right to decree final distribution, where at the time the estate is involved in litigation. *Woerner, Administration*, pp. 1230, 1234; *Estate of Ricaud*, 57 Cal. 421; *Ham v. Kornegay*, 85 N. C. 119; *Cummings v. Cummings*, 143 Mass. 340, 9 N. E. 730; *State v. Roth*, 47 Ark. 222, 1 S. W. 98; *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231; *Bennett's Estate*, 132 Pa. St. 201, 19 Atl. 58; *Horton v. Barto*,

¹Reported in 81 Pac. 857.

17 Wash. 675, 50 Pac. 587; *Huston v. Becker*, 15 Wash. 586, 47 Pac. 10. An adverse claim must be determined by a court of general jurisdiction, and not by a probate court. Woerner, Administration, p. 344; *Theller v. Such*, 57 Cal. 447; *In re Walker's Will*, 132 N. Y. 20, 32 N. E. 633; *In re Mousseau's Estate*, 40 Minn. 236, 41 N. W. 977; *Estate of Haas*, 97 Cal. 232, 31 Pac. 893; *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. 150; *In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593; *In re Singleton's Estate* (Nev.), 64 Pac. 513.

William Martin, for respondents.

MOUNT, C. J.—This appeal is from an order in probate settling the final account of the executors of the estate of Paul Drasdo, deceased, and making distribution of his separate estate. Paul Drasdo died on June 15, 1903. He left a valuable estate. There were no direct heirs except a widow, who was not living with him at the time of his death. Prior to his death he made a will, by the terms of which he disposed of all his property, leaving to his widow one dollar. Immediately after his death a special administrator was appointed, who took charge of the estate. The will was subsequently probated, and Frank Jobst and Ernst Drasdo were appointed executors. They qualified as such and, on June 29, 1903, gave notice to creditors.

Subsequently the widow applied for letters testamentary upon the community estate. Upon notice and a hearing, J. A. Paine was appointed such administrator, and qualified. Thereafter the widow made an application for an allowance pending the settlement of the estate, and on the 28th day of October, 1903, said allowance was made, and sustained by this court in *In re Drasdo's Estate*, 36 Wash. 478, 78 Pac. 1022. On the 11th day of October, 1904, the executors filed their final account and petitioned for distribution of the separate estate of the deceased, and gave due

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notice thereof. The widow and the administrator of the community estate appeared and filed exceptions to the account, and alleged that all the property then in possession of the executors was community property. At the time of the hearing on the final account, the widow and the administrator of the community estate objected to the jurisdiction of the court to settle the estate, upon the ground that certain litigation was then pending concerning the property of the estate. It was stated that the remittitur had not gone down from this court in *In re Drasdo's Estate, supra*, and that an action which had been brought by the administrator of the community estate, claiming the whole estate as community property, was also pending in this court. These objections were denied, and the court proceeded to a hearing upon the settlement of the estate and of the final account, and at the close thereof made findings as follows:

"(1) That said Paul Drasdo died in Seattle, King county, Washington, on the 15th day of June, 1903, leaving a last will and testament disposing of all of his separate estate, wherein Frank Jobst and Ernst Drasdo were selected and appointed executors, and thereafter on, to wit, the 29th day of June, 1903, the said last will and testament was duly and regularly filed and probated in the superior court of King county, State of Washington, and since the probating of said will as aforesaid no contest of any kind has been inaugurated against the same.

"(2) That on the 14th day of August, 1902, said Paul Drasdo, deceased, and the said Dora Marsh Drasdo were married at Seattle, King county, Washington, and the marital community then formed existed until the date of the death of said Paul Drasdo, deceased, as aforesaid.

"(3) That at the time of the death of the said Paul Drasdo, he was possessed of the following separate property, to wit: Two certificates of deposit in the sum of \$5,000 each; eight railroad bonds of the Northern Railroad of California of the par value of \$1,000 each, with accrued interest; one restaurant known as the Vienna Cafe, situated at 520 Second avenue, Seattle, Washington, together with the lease thereon.

"(4) That at the time of the death of the said Paul Drasdo, the marital community consisting of the said decedent and the said Dora Marsh Drasdo, possessed the following community property, to wit: \$1,060.75 found upon the person of said decedent at the time of his death; \$1,000 found in the safe deposit box in the city of Tacoma, State of Washington; one horse and buggy, one diamond ring, household furniture and effects of the value of \$4,000, personal furniture and furnishings situated in the Vienna Cafe hereinabove referred to of the value of \$800, a claim against said Vienna Cafe for the services of the said Paul Drasdo, deceased, amounting to two thousand dollars.

"(5) That during the existence of said marital community, the said Paul Drasdo, deceased, and Dora Marsh Drasdo, received from the said Vienna Cafe and used for their household expenses the sum of \$2,000, and in addition thereto the said marital community during its existence received from said Vienna Cafe from the the separate estate of said Paul Drasdo, deceased, the sum of \$5,000.

"(6) That on, to wit, the 20th day of April, 1903, said Paul Drasdo, deceased, transferred to a corporation theretofore formed, named the Vienna Cafe, the said restaurant and the good will thereof, the same being then and having been for more than two years prior thereto a separate property, and received for such transfer twenty-eight shares of the capital stock of said corporation.

"(7) That under the terms of the said last will and testament of the decedent, Paul Drasdo, he bequeathed to Ernst Drasdo, his brother, the twenty-eight shares of the capital stock of the Vienna Cafe, a corporation, hereinabove referred to; to Albert Thalheim, a half-brother, of St. Louis, Missouri, the sum of \$5,000; to Dora Marsh Drasdo, the sum of one dollar, and the remainder of his estate to Martha Brobardt, a sister, of Karls Ruhe, Germany.

"(8) On the 28th day of October, 1903, this court, by an order regularly made, after full hearing and notice to all the parties, set apart to Dora Marsh Drasdo, widow of said decedent, all of the household furniture and effects hereinabove referred to, amounting in value to about \$4,000, and in addition thereto, at the same time, ordered that she be paid from the separate estate of the said Paul Drasdo, deceased, the sum of \$250 per month as a family allowance

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pending the settlement and distribution of the said decedent's estate, and said order was thereafter affirmed by the supreme court of the State of Washington.

"(9) That during the existence of the marital community consisting of said Paul Drasdo and Dora Marsh Drasdo, the said Paul Drasdo so commingled his earnings as manager of the Vienna Cafe with the property of said Vienna Cafe that it was impossible to ascertain without investigation which was community and which was separate property, and in addition there was good reason to believe at the preliminary hearing that the lease of the said Vienna Cafe was the community property of said Paul Drasdo and Dora Marsh Drasdo, and upon petition this court, on the 14th day of July, 1903, appointed J. A. Paine administrator of the community estate of the said Paul Drasdo and Dora Marsh Drasdo and directed him, as such administrator, to take possession of the said Vienna Cafe and hold and conduct the same until the further order of the court. That thereafter, on to wit, the 10th day of August, 1903, this court, by an order made, directed said administrator to turn the said Vienna Cafe over to the executors of the estate of Paul Drasdo, deceased. That during the time said administrator of the community estate was in possession of said cafe and conducted the same, he collected certain moneys and made certain disbursements necessary in the management thereof.

"(10) That due and legal notice of the petition of the executors herein for the settlement of their final account and the distribution of said estate, was posted and published and given in all respects as required by law and all the debts of the said decedent have been paid with the exception of the expenses of the administrator and the family allowance of \$250 per month to Dora Marsh Drasdo, hereinabove referred to. That more than one year has elapsed since the publication of the notice to creditors to present their claims, from the time of the filing of the publication of the said notice up to the time of the filing of the said petition for settlement and distribution, and said estate is now in a condition to be distributed under and in accordance with the will of the said decedent, Paul Drasdo.

"(11) That the final account filed herein by said executors of said estate is correct in all respects, and is hereby approved, settled and allowed."

The twelfth finding fixed the fees of the executors and the attorneys. Upon these findings an order was made, approving the account and distributing the separate estate according to the terms of the will, after paying to the widow \$4,666.66, the amount due her under the order of allowance up to the time of the final order. The widow appeals.

Twenty-five errors are assigned, many of which are obviously without merit. We shall notice those only which appear to have been made in good faith. Four of the assignments of error are based upon objections to the jurisdiction of the court to decree a final distribution while there was litigation pending involving property belonging to the estate. Several authorities are cited to the effect that, where there is undetermined litigation pending, which involves the right of the estate to certain property, the estate is not ready for distribution. But in the record before us, whatever litigation there had been concerning this estate appears to have been finally determined. It is true that one or two appeals had been taken, but those appeals appear to have been long since disposed of. So that, if the rule is as contended for by appellant, it is not now applicable to this case.

Appellant also contends that the court erred in making certain findings determining what property was the separate estate of Paul Drasdo, deceased, and what property was community property of Drasdo and wife. These questions had formerly been determined in the course of the administration of the estate and in special proceedings for that purpose, and certain property had been set over to the appellant and to the administrator of the community estate. The separate estate had been set over to the executors under the will. These findings made no change in that respect, but simply recited the ultimate facts in relation thereto. We think no error can be based on such recitals, and that appellant cannot review them in this proceeding.

Appellant also contends that the court erred in finding that all the debts had been paid with the exception of the

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Syllabus.

expenses of administration and the widow's allowance; but as we read the evidence, there were no debts except the funeral expenses and the expenses of administration. It is true, a bill of \$50 was presented by one person claiming to be a creditor, but it was disallowed and withdrawn, and the time for enforcing it had long since expired. There seems to be no dispute in the evidence as to the correctness of any item of the account of the executors. All the items thereof appear to be proper and legally chargeable against the estate, and we see no reason why the account should not be allowed and the estate finally settled as ordered by the court.

The order appealed from is therefore affirmed, with costs against the appellant.

HADLEY, CROW, RUDKIN, and FULLERTON. JJ.. concur.

(No. 5223. Decided August 2, 1905.)

LUCINA MITCHELL. *Respondent*, v. ALANSON MITCHELL,
Appellant.¹

DIVORCE — CRUELTY — RENDERING LIFE BURDENSOME — FINDINGS — CONSTRUCTION. Upon granting a divorce for cruelty, the findings need not specifically include one that the cruelty rendered life burdensome, where the specific acts of cruelty found conclusively show that they did render life burdensome.

SAME — DISTRIBUTION OF PROPERTY — AWARDED ALL TO WIFE — DISCRETION. It is within the discretion of the trial court, upon granting a divorce and awarding the custody of infant children to a wife, to award her all the real estate, of the value of \$1,600, where she is not strong and the husband is an able bodied man and wholly at fault.

SAME — DECREE — ALTERNATIVE PAYMENT — TAKING ADVANTAGE OF. Error cannot be predicated on the entry of a judgment of divorce decreeing real estate to the wife, without giving the defendant an opportunity to take advantage of an alternative, expressed in the conclusions of law, of paying \$1,600 in lieu thereof, where the record fails to show that the defendant desired so to do at the time the judgment was entered.

¹Reported in 81 Pac. 913.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered February 15, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing a divorce, and awarding property and the custody of children. Affirmed.

Myers & Warren, for appellant.

Martin & Grant, for respondent.

MOUNT, C. J.—The plaintiff in this action was granted a decree of divorce from defendant, upon the ground of cruelty. She was awarded the care and custody of two infant children, and all the real property of the community. Defendant appeals.

The evidence taken on the trial of the cause is not brought here on this appeal, and no exceptions were made to any of the findings. The only questions presented are based upon the face of the record. It is contended by appellant that the acts of cruelty found by the trial court are insufficient to justify the decree, because the court did not find that such facts rendered the life of the respondent burdensome. The finding of cruelty is as follows:

“That about six years ago the above named defendant began to mistreat and abuse and cruelly treat the plaintiff in this, that he would scold and abuse the plaintiff in private and in company, and slight her in all manner of ways when out in company, in such ways as were calculated to humiliate and degrade plaintiff. From that time and ever since said date the defendant has been continually mistreating the plaintiff by calling her vile names and conduct which is too infamous to be here set out, and during all of said time has continued to curse and abuse and scold plaintiff and to compel her to work out upon cook wagons for a living, and when plaintiff would be sick and unable to do work, the defendant would compel her by force to do work, and has time and again since said date and very recently too, told this plaintiff to take her brats and leave and never come back, and has frequently threatened to kill this plaintiff, and plain-

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tiff believes that said defendant will put his threats into execution and so thoroughly afraid of said defendant has this plaintiff become that, on or about the 1st day of July, 1903, while defendant was making his vile and vicious threats, this plaintiff was compelled to and did take the two younger children and leave the defendant's abode and has ever since said time stayed away from defendant for the reason that she cannot live with him, for the further reason that she is afraid for her life and that of her children."

The necessary conclusion from the facts found is that the respondent's life was rendered burdensome. The finding of the court that respondent believed that appellant would put his threats to kill into execution, that she was compelled to leave her abode and remain away because she could no longer live with appellant, and that she believed the appellant would take her life and that of her children, conclusively shows that her life was rendered burdensome. It was not necessary for the court to make a specific finding that the cruelty of appellant rendered respondent's life burdensome, when the facts found lead irresistibly to that conclusion.

Appellant next contends that, because the court awarded all the real property to respondent, such disposition thereof was not a just and equitable one. Under Bal. Code, § 5723, the disposition of the property of the parties to a divorce case rests largely within the discretion of the trial judge. This discretion is guided by the respective merits of the parties and the condition in which they will be left by the divorce. Where there is but little property, and where there is no fault on the part of the wife, and where she is not strong and is awarded infant children to be cared for, and where the husband is a strong, able-bodied man, and wholly at fault, as appear to be the facts here, a just and equitable disposition of the property may mean that it should all be given to the wife. We find nothing in this case which shows that the trial court abused its discretion in respect to the distribution of the property.

In the findings of fact, which were made on February 13, 1904, the trial court recited that the parties had an interest in certain real estate which was of the value of \$1,600. In the conclusions of law the court stated that the respondent was entitled to "the sum of \$1,600 out of the real estate, or in lieu thereof all the property described in said findings." The decree, which was signed on the same day and was filed two days later, gave no opportunity to the appellant to comply with the alternative stated in the conclusions, but awarded the whole interest in the real estate to the respondent. Appellant now complains because no time was fixed by the decree within which he might pay the sum of \$1,600 to the respondent and save the real estate to himself. What we have said above as to the discretion of the trial court applies as well to this contention as to the last one. Furthermore, the record contains nothing to show that appellant desired to pay the money in lieu of the real estate at the time the decree was made or entered. The appellant may have declined the option at the time the findings were made, and thereupon the court may have made the decree absolute. We must indulge all presumptions in aid of the decree and not against it.

No errors appearing on the face of the record, the judgment is affirmed.

HADLEY, FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

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(No. 5654. Decided August 2, 1905.)

VULCAN IRON WORKS, *Appellant*, v. KENT LUMBER
COMPANY, *Respondent*.¹

JUDGMENT—RES ADJUDICATA—ACTION ON CONTRACT—SAME ISSUE RAISED BY SUPPLEMENTAL COMPLAINT IN FORMER ACTION OF REPLEVIN—BAR. Where, in a supplemental complaint in replevin, the plaintiff claimed damages for the expense of shipping and repairing the logging engine replevied, a judgment in favor of the defendant, upon finding that the plaintiff had sustained no damages by reason of the detention and withholding of the property, is *res adjudicata* upon a subsequent suit between the same parties to recover damages for the expense of said shipment and repairs.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 6, 1905, upon a finding, in favor of the defendant, of a former adjudication, after a trial on the merits before the court without a jury, dismissing an action on contract. Affirmed.

Benton Embree, for appellant.

John G. Barnes, for respondent.

MOUNT, C. J.—Appellant brought this action to recover from respondent for two items under a contract of lease entered into between the parties, which items are as follows: (1) For the expenses of shipping a logging engine from Barnston to Seattle in King county, alleged to be \$493.50, and (2) for repairs of said engine amounting to \$62.34. The respondent pleaded a former adjudication, which was sustained by the trial court. Plaintiff appeals.

The facts are not disputed. It appears that the appellant in this action, some time in July, 1903, brought an action in replevin to recover possession of a certain logging engine, and for damages. At the time that action was begun, the property was delivered by the sheriff into the possession of the plaintiff therein. Thereafter, in September, 1903, the

¹Reported in 81 Pac. 913.

appellant in this action, being the plaintiff in that action, filed a supplemental complaint, and alleged damages for removing the engine from the woods to Seattle, for unloading the same from a car, and for repairs to the engine, being the same items now sued for in this action. An answer was filed by the respondent, denying the allegations of the supplemental complaint. Thereafter, the replevin cause was tried before the court without a jury. Upon the trial, evidence was offered to prove the items set out in the supplemental complaint, excepting the item relating to the repairs to the engine, concerning which no evidence was offered. The respondent offered evidence to controvert the evidence offered by appellant on the items of the supplemental complaint. After the evidence was all in, the court found that appellant had sustained no damages by reason of the detention and withholding of said property by the respondent, and entered a judgment accordingly. No appeal was prosecuted from that judgment.

Subsequently, appellant brought this action to recover for the same items alleged in the supplemental complaint in the replevin action. The cause was tried to the same court and judge who tried the replevin action, and, upon the record in that case, the court found that there was a former adjudication of the issues in this case, and dismissed the action. We think these facts clearly show a former adjudication of the question in issue, and bring this case clearly within the case of *Stern v. Washington Nat. Bank*, 14 Wash. 511, 45 Pac. 37.

The judgment of the lower court is affirmed for the reasons therein stated.

CROW, ROOT, RUDKIN, and FULLERTON, JJ., concur.

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Opinion Per MOUNT, C. J.

(No. 5604. Decided August 2, 1905.)

C. H. GAFFNER, *Respondent*, v. J. W. R. JOHNSON,
Appellant.¹

APPEARANCE—SPECIAL—WAIVER. A special appearance to dismiss an action because of a defective service of summons is waived by a general appearance made without preserving the special appearance.

LIMITATION OF ACTIONS—ACCRUAL—BY MASTER AGAINST SERVANT FOR INDEMNITY—PAYMENT OF JUDGMENT. An action does not accrue in favor of a master against a servant on account of injury to a third person, caused by the servant's negligence, until the master has been compelled to pay the party injured, and under Bal. Code, § 4805, is not barred until two years thereafter.

COLLISION—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a finding that the master of a steamer was guilty of negligence in colliding with the steamer P, a rival boat, when it appeared that he was, at the time, in his pilot house with an unobstructed view of the P, which was running on a parallel course, two or three hundred feet in advance, that the water was smooth, and that under the rules of navigation the P had the right of way.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 10, 1904, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action brought by a master against his servant for indemnity. Affirmed.

Frank P. Lewis, for appellant.

Baxter & Wilson and *A. C. MacDonald*, for respondent.

MOUNT, C. J.—This action was brought by the respondent to recover from his servant certain damages which respondent had been compelled to pay on account of negligence of said servant. Respondent recovered a judgment in the court below, and the defendant appeals.

Respondent was the owner of the steamship *Mary F. Perley*, plying between Seattle and Port Orchard. Appellant was employed by the respondent as master of said vessel.

¹Reported in 81 Pac. 859.

On November 21, 1899, the steamer Perley, while on her voyage from Seattle to Port Orchard, came into collision with, and damaged, the steamer Pilgrim, which was an opposition boat on the same route. It is charged by the complaint that the collision and damages were caused by the negligent and careless manner in which appellant navigated respondent's vessel. It is also charged that respondent was sued by the owner of the Pilgrim, and as a result of the suit a judgment was obtained against him on June 27, 1901, for the sum of \$497, on account of the damages sustained by said Pilgrim, which amount respondent was required to, and did, pay. The answer of appellant denied that the collision occurred by reason of any carelessness or negligence on his part, and denied that a judgment was obtained against respondent therefor, and denied that respondent paid the same, and alleged affirmatively, (1) that the collision was caused solely by the negligence of the steamer Pilgrim, and (2) that the cause of action against appellant was barred by the statute of limitations. The cause was tried to the court without a jury, and findings were made in favor of the plaintiff, and a judgment was entered thereon for \$497 and costs.

Appellant contends, first, that the court erred in denying a motion to dismiss the action because of a defective service of the summons. The record shows that appellant made a general appearance in the action, after the motion was denied, without preserving his special appearance. He therefore waived the special appearance. *Larsen v. Allan Line Steamship Co.*, 37 Wash. 555, 80 Pac. 181, and cases cited.

Appellant next contends that the action is barred because it was not commenced against him until more than three years after the date of the collision. The record shows that a judgment was obtained against the respondent by the owners of the Pilgrim, in June, 1901; that in December, 1902, respondent brought this action against the appellant. No cause of action accrued to the master, as against the servant,

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until the master was compelled to pay the party injured by the act of the servant. 20 Am. & Eng. Ency. Law (2d ed.), 51, 52. The master thereafter had two years within which to bring the action. Bal. Code, § 4805. The action was well within that time.

Appellant insists that the evidence is not sufficient to sustain the judgment. After carefully reading the whole record which is filed here, we are of the opinion that the appellant could have avoided the collision; that it was his duty to have done so. The collision occurred in the day time, the weather was fine, the water smooth. The vessels had been running a parallel course, with the Pilgrim some two or three hundred feet in advance of the Perley, which was upon her starboard side. Under the rules of navigation, which also appear in the record, the Pilgrim had the right of way, and the Perley was bound to keep out of her way. The appellant was in the pilot house of the Perley, and he had an unobstructed view of the Pilgrim and her movements. We think the trial court was clearly justified, under these conditions, in finding that the appellant was negligent and careless in ramming the Pilgrim and causing her damage. The evidence is also clear to the effect that the respondent was required to, and did, pay the sum of \$497 on account of the damages which the Pilgrim sustained by reason of the appellant's negligence.

There is no reversible error in the record. The judgment is therefore affirmed.

HADLEY, CROW, RUDKIN, and FULLERTON, JJ., concur.

(No. 5401. Decided August 2, 1905.)

HENRY F. ALLEN, *Appellant*, v. CHARLES McALLISTER,
Respondent.¹

- FACTORS—PRINCIPAL AND AGENT—AGENT SELLING ON COMMISSION—
- NOTE FOR ADVANCES—DEFENSES—NEGLIGENCE IN CARE OF GOODS—FAILURE TO SELL AS INSTRUCTED—RATIFICATION—SETTLEMENT WITHOUT DISAPPROVING ACTS—WAIVER OF CLAIM. In an action upon a promissory note, given for the amount of advances made by the plaintiff, a factor, to whom wool had been consigned by the defendant for sale on commissions, the defendant cannot set up as a defense and counterclaim the negligence of the factor in caring for the wool and the failure to sell according to instructions, where it appears that the wool had been shipped and the advances made more than a year prior to the execution of the note, and any neglect of the plaintiff was prior to that time, that the defendant then called on the plaintiff, examined the wool, made no complaint and gave orders that it be further held, and gave his note on the plaintiff's statement of the amount then due, and then waited a year longer before making any claim; since he ratified the acts of the factor by failing to disapprove of the same within a reasonable time; and in the absence of evidence of failure of duty after the execution of the note, a verdict should have been directed for the plaintiff.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered April 17, 1903, upon the verdict of a jury rendered in favor of the defendant, upon a counterclaim, in an action upon a promissory note. Reversed.

Carr & Preston and *Whitson & Parker*, for appellant.

H. J. Snively, for respondent.

MOUNT, C. J.—This action was brought by the appellant to recover a balance of \$1,689.09, alleged to be due upon a promissory note for \$3,556.50. The amended answer of respondent admitted the execution and delivery of the note, but alleged that it was made without consideration and for the accommodation of the appellant, under circumstances substantially as follows: That appellant and respondent, long prior to the execution of the note, had entered into an

¹Reported in 81 Pac. 927.

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agreement whereby appellant engaged to sell a certain lot of wool for the respondent, on commission; that in pursuance of such agreement, appellant advanced on said wool to respondent an amount of money represented by the face of the note; that the wool was delivered by respondent to appellant, and, at the time of the agreement, there was no understanding that the note was to be executed, and that subsequently the note was executed without any new agreement and without consideration.

As a further defense the answer alleged, that about August or September, 1898, the respondent entrusted to appellant a large amount of wool, to be sold by appellant upon commission at San Francisco, California, upon representations made by appellant to respondent that appellant was engaged in selling wool on commission in said city, and that he was a competent and skillful commission merchant and wool factor; that appellant received said wool and undertook to sell it, upon commission; that appellant failed to take proper care of said wool and permitted it, through neglect and lack of proper care, to become deteriorated in value; that he failed to use ordinary care and skill in keeping said wool in proper condition for sale, and failed to use ordinary care, skill, and diligence in the sale thereof; that he failed to use ordinary care in carrying out certain instructions and requests made by respondent for the sale of said wool; that he carelessly and negligently held said wool, accumulating heavy charges of interest, taxes, storage, etc., and that if appellant had used diligence he would have received \$6,000 therefor, which would have left a balance of \$1,511.70 over and above the amount appellant had advanced on said wool. Respondent prayed for damages for that amount.

The reply admitted the receipt of the wool for sale upon commission, and that, at the time the wool was delivered to appellant, there was no agreement for a note for advances made, and denied the allegations of negligence and want of care in keeping and disposing of said wool. The reply fur-

ther pleaded affirmatively, that shortly prior to the execution of the note sued on, a full and complete settlement was had in respect to all transactions and dealings prior to the date of the note, and that, as a result thereof, it was ascertained that respondent was then indebted to appellant in the sum of \$3,456.50, and that respondent then and there agreed with appellant that, if appellant would advance to respondent an additional \$100, respondent would then execute and deliver a promissory note for the full amount of of said indebtedness, plus the said sum of \$100; that thereupon appellant advanced to respondent the sum of \$100, and respondent executed and delivered to appellant the note sued upon; that the said note was executed with full knowledge of all the matters set out in the affirmative answer. The cause was tried to the court and a jury, and a verdict was rendered in favor of respondent for \$313.14, upon which a judgment was entered. The appeal is from this judgment.

The facts are substantially as follows: The appellant is a commission merchant, residing in San Francisco, California. The respondent is a wool grower, residing at North Yakima, this state. On or about June 1, 1898, the respondent shipped from North Yakima, to appellant at San Francisco, about 40,000 pounds of wool, for sale in the usual course upon commissions. When the wool was received by appellant, he advanced to respondent \$3,000, and paid the freight and other charges to San Francisco, in addition to said advance. Nothing appears to have been done with the wool for more than a year, when on September 7, 1899, respondent wrote to appellant a letter, as follows:

"Dear Sir:—As I have not heard from you for some time and I see wool is climbing up a little in price, I wish to know what is the best price you can get for the wool I shipped you over one year ago. I have about 50,000 pounds of wool stored here waiting for a good market, but as I will require money to buy hay early this fall, I am investigating the best market to dispose of same. The clip is about the

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same as last year's, a little cleaner. I had a few reports from the East, but hope the Frisco market is still better. Trusting to hear from you soon, I remain, yours truly, Chas. McAllister."

Appellant replied on September 14, 1899, and said:

"If I were to force your wool for sale today it would bring 10¾ to 11 cents on a basis of 74 per cent shrinkage. But you must remember your wool is a good staple wool, and will sell for staple wool. . . . I therefore do not feel inclined to push the sale of your wool at present as I feel I can do much better with it. . . . I can probably make a sale of your wool now on hand at a price to yield you sufficient means for hay."

On November 10, 1899, respondent wrote to appellant as follows:

"As I have had no reports from you for some time concerning the wool, I am getting anxious, as I expected you would have mine sold by this time, as I see the market has advanced a little you better sell my clip at your earliest convenience, as the payments for winter hay is coming on soon and we need money. I still have my other clip on hand, and may ship to you after the sale of the clip you have already got. Hoping to hear from you soon, I remain, yours truly, Chas. McAllister."

On November 13, 1899, appellant answered this letter as follows:

"I have been expecting daily to sell your wool, and have every reason to think I will be successful in making the sale within the next few days, when I will advise you at once. I think you can safely rely upon my being able to sell within the next ten days or two weeks. The market as you say is somewhat better than it has been for some time past. There is now an increased demand, and a slight advance in price. You can rest assured that I will obtain the best price possible."

On January 3, 1900, respondent wrote as follows:

"As I have not heard from you for a long time, and as I instructed you to sell my clip of wool in your hands in my

last letter, as I was in need of money, I am wondering what is the reason of delay, as I see wool is a fine price in the East, but as I have confidence in your judgment in handling wools in the best market, I am wondering if you still expect much advance in price within the next month or so. Please let me hear from you, and oblige."

On January 17, 1900, the appellant replied to the last letter above, as follows:

"Your favor of January 8th received and has my careful attention. I have held your wool because I thought I could do better with it. I am negotiating with a party in regard to your wool, and hope within a few days to be able to render you satisfactory returns. The London market opens at same price as closing quotations of last sale, which were high, and unless the wool market in the East tightens up, we may expect a continuance of good prices for wool. At present, of course, things are quiet in the East, as they always are at this time of the year; but woolen goods are selling in large quantities at an advance price; and hence everything is in favor of obtaining satisfactory prices for wool."

On April 12, 1900, the appellant wrote to respondent, saying:

"I regret exceedingly that it has been so long, but in holding I have acted as I thought was for your interest. I will dispose of the wool just as soon as I can obtain what I consider its value."

On June 18, 1900, appellant wrote to respondent as follows:

"The wool market remains dull and quiet both east and west, and there has been very little wool sold since the first of last January. . . . I do not look for any change in the situation until the end of July or August."

In September of 1900, after the time of the foregoing correspondence, the respondent went to San Francisco to see about his wool. While there he called upon the appellant, and they talked over the condition of the wool market, and respondent examined his wool and concluded to have it

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scoured, and appellant agreed to advance the money therefor, which was afterwards done. Respondent, at the time of this conversation, directed the appellant to hold the wool until the month of February, 1901. At this same time a statement was rendered to respondent by appellant, showing the amount of advances that had been made up to that time. Respondent then secured an additional advance of \$100, which was added to the balance due. The interest was reduced from seven to six per cent, and the respondent thereupon executed and delivered the note sued upon. At that time respondent was told that a small part of the wool had been sold. Respondent testified upon the trial that he was not satisfied with appellant's explanation, but that wool was a little low at the time he was down, or he would have attempted to sell the wool himself; that he was not in a position to redeem the wool just at that time, so the best thing to do was to have the wool scoured and leave it in appellant's hands. The balance of the wool was afterwards sold at short intervals up to June 5, 1902, and the net proceeds amounted to \$2,593.27, leaving respondent indebted on the note at that time in the sum of \$1,300.18.

There is no evidence in the record before us that appellant was negligent in the care of the wool, or in the sale thereof, after the time the note was given in September, 1900, or that appellant after that time failed, neglected, or refused in any manner to comply with the request of the respondent to sell the wool. If appellant was negligent at all in the discharge of any duty which he owed to the respondent, such negligence occurred prior to the execution of the note sued upon, and respondent was fully aware thereof at the time the note was given. At the close of respondent's evidence, the appellant moved the court for a directed verdict, upon the ground that there was no evidence of any failure of duty on the part of the appellant subsequent to the execution of the note sued on, and that respondent, by the execution of the note, is estopped to claim damages prior to that time.

This motion was denied, and the ruling of the court thereon is the first error assigned.

Respondent has not appeared in this court. He has filed no brief, and no argument has been made in his behalf. We are of the opinion, upon the record as presented, that the trial court erred in refusing the motion for a directed verdict. It is true, as stated by the lower court when ruling upon the motion, that no claim for damages was made or discussed at the time the note was given on September 17, 1900. It is also true that the damages claimed in this action had accrued prior to that time, and if respondent had actually been damaged by any act or negligence of the appellant, he was then fully informed and aware of it and should have called the attention of appellant thereto. The fact that he did not do so seems to be conclusive of the fact that he did not then consider that appellant had violated any duty he owed to respondent; or if respondent did then think that appellant had theretofore been negligent in the care of the wool or in the sale thereof, his failure to express disapproval must now be held to amount to a waiver of it, and a ratification of the acts of the appellant.

If the letters of the respondent can be held to amount to an instruction to sell the wool, and if the failure of the appellant to sell it as instructed can be held to be a departure from these instructions, such departure must be held to be ratified because the principal expressed no disapproval within a reasonable time. 12 Am. & Eng. Ency. Law (2d ed), 653; *Kendall v. Earl* (Cal.), 44 Pac. 791; *Searing v. Butler*, 69 Ill. 575; *Patrick v. Pote*, 117 Mass. 297; *Meyer, Weiss & Co. v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Austin v. Ricker*, 61 N. H. 97; *Woodward v. Suydam and Blydenburg*, 11 Ohio 361.

The respondent at the time the note was given should have expressly disapproved the failure to sell the wool, and stood upon such disapproval. Instead of so doing, he impliedly ratified the previous acts of his agent by agreeing to the

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account and giving his note therefor. He then waited more than a year and until it was discovered that the wool would not sell for enough to pay the note. He then, for the first time, asserted that the failure to sell prior to the making of the note was the cause of loss to him. Under these circumstances, it was the duty of the court to direct a verdict for the balance due on the note, viz., \$1,300.18, with interest at six per cent per annum since June 5, 1902.

The judgment is therefore reversed, and the cause remanded for a judgment in favor of appellant in accordance with this opinion.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., took no part.

(No. 5471. Decided August 2, 1905.)

R. B. HALL, *Respondent*, v. WEST & SLADE MILL COMPANY,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—VIOLATION OF STATUTORY DUTY—GUARDING MACHINERY—ASSUMPTION OF RISK. The defense of assumption of risk is not available to a master where the servant is injured by reason of the master's failing to comply with the factory act, Laws 1903, p. 40, requiring operators of mills to place safeguards over cogs, gearings, and shaftings that can be properly safeguarded (ROOT, RUDKIN and CROW, JJ., dissenting).

SAME—CONTRIBUTORY NEGLIGENCE—SERVANT MOMENTARILY FORGETTING UNGUARDED SET SCREW. A mill hand whose duty required him to constantly work about a shafting and who had knowledge of an unguarded set screw therein, is not guilty of contributory negligence in coming in contact with such set screw, in a moment of forgetfulness while lifting a heavy timber, where he did not assume the risk of injury therefrom, by reason of the fact that the master had failed to comply with the factory act requiring such shafting to be guarded.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 7, 1904, upon the ver-

¹Reported in 81 Pac. 915.

39	447
41	68
41	155
41	159
41	166
41	353
41	401
41	518
41	519
41	580
39	447
42	234
42	235

díct of a jury, rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a mill, through coming in contact with a set screw upon a revolving shaft. Affirmed.

J. B. Bridges, for appellant.

Govnor Teats, for respondent.

FULLERTON, J.—The respondent was injured while employed in the lumber mill of the appellant, and brought this action to recover therefor. He was successful in the court below, and this appeal is from the judgment entered in his favor.

In the lumber mill in question were two parallel lines of rollers, located about four feet apart, extending almost the entire length of the mill. One set of these, called dead rollers, led from the back of the gang edger, and received such timber products as were passed through that machine. The other set were called live rollers, being kept in motion, when in use, by the motive power used to operate the mill. The device used to connect the rollers with the motive power was an ordinary steel shaft, with cogwheels and pinions, which extended the entire length of the line of rollers; the same being fastened to the frame work in which the rollers operated on that side next to the dead rollers before mentioned. The shaft was not one continuous piece, but was made up of several sections connected together by means of iron bands or collars, held in place by set screws. The shaft, cogwheels, pinions, collars and set screws were left uncovered and exposed.

The respondent was required to work between the two lines of rollers. A part of his duty was to take that part of the timber products passing through the gang edger which was suitable only for laths or wood and throw it over the live rollers to the gang saws, which were located on the opposite side of the same. While performing these duties on

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the morning of the 21st of August, 1903, the respondent's clothing caught on a set screw, which had been allowed to project from three-fourths of an inch to an inch from one of the collars used to splice the shaft, and wound around the shaft, drawing the respondent down upon it, and between it and the frame work which held the rollers, breaking his arm between the elbow and shoulder, breaking his collar bone, and crushing and maiming the bones of his shoulder, leaving him a permanent cripple.

To a complaint embodying the foregoing facts, the appellant answered, and, after making certain denials and admissions, set forth that the respondent had actual notice and knowledge, for some two weeks before he was injured, that the shafting on which he was injured was in an uncovered and exposed condition, and that the set screw which caught his clothing projected from the collar, and knew, also, of the dangers incident to working in such an exposed place; averring that he not only assumed the risk of working in that place, but was guilty of contributory negligence in so doing. To the defense of assumed risk, a demurrer was interposed, and sustained by the court on the ground that the appellant had not complied with the act of March 6, 1903 (Laws 1903, p. 40), which requires all operators of mills and workshops to place safeguards over all such cogs, gearings, shaftings, and the like, that can be properly safeguarded, before putting the same into use.

On the trial the respondent admitted, on cross-examination, that he knew for some time prior to receiving his injury, of the unguarded machinery, and of the fact that the set screw on which his clothing caught projected from the collar for a considerable distance; testifying also that he knew that if it caught his clothing it was liable to injure him, and that he came against it in a moment of forgetfulness while handling a heavy piece of timber. A motion for nonsuit was interposed at the conclusion of the respond-

ent's case to the jury, which the trial judge overruled. The judge also refused to instruct the jury to find for the appellant on the ground that the respondent had assumed the risk, but instructed them to the effect that the appellant could not claim the benefit of the common law doctrine of assumed risk, for the reason that the appellant had not safeguarded the shafting on which the respondent was injured, as it was required to do by the mandate of the statute above cited.

The several rulings of the trial court to the effect that the defense of assumption of risk was not available to the appellant, as against the respondent's cause of action, constitute the first error assigned, and it is to this question that the arguments of counsel are mainly directed. The rule as announced by the trial court is in accord with the decision of this court in the case of *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, and unless that case is to be overruled, it is controlling on the question here. The appellant urges that it should be overruled, contending that it is neither supported by the better reasoning nor by the weight of authority. But after further consideration, we are not convinced that the case is unsound in principle, or that it violates any rule of public policy. It is not necessary here, however, to state the reasons on which the decision rests. This is ably done by the judge who announced the opinion in the case, and by the distinguished judge from whom he so lengthily quoted. But we do not wish to be understood as conceding that the case is without authority in its support. While it may be true, as the appellant contends, that the weight of authority is against it, yet we find it supported by courts respectable in numbers as well as in ability. In addition to those cited in the case itself, the following may be consulted: *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Sipes v. Michigan Starch Co.* (Mich.), 100 N. W. 447; *Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *Litchfield*

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Coal Co. v. Taylor, 81 Ill. 590; *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, 10 S. W. 484; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Henderson v. Kansas City*, 177 Mo. 477, 76 S. W. 1045; *Greenlee v. Southern R. Co.*, 122 N. C. 977, 30 S. E. 115, 65 Am. St. 734, 41 L. R. A. 399; *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288, 52 Atl. 531, 93 Am. St. 887. In some of the cases above cited, particularly those from the courts of Illinois and Indiana, no distinction seems to be made between the doctrine of assumption of risk and of contributory negligence, but the facts of the cases, as well as the language of the courts, support the doctrine for which the *Green* case contends. We conclude, therefore, that the trial court did not err in holding that the doctrine of assumption of risk was not available to the appellant as a defense to the respondent's cause of action.

The appellant next contends that the court erred in refusing to rule, as a matter of law, that the respondent was guilty of contributory negligence. All that the evidence shows on this question is that the respondent continued in his work after he had knowledge of the fact that the collar and set screw which caused his injury were uncovered. But it will hardly do to say that an employee is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for working therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employee of contributory negligence for working in a place where he does not assume the risk of injury, it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation. *Narrawmore v. Cleveland etc. R. Co.*, 96 Fed. 298, 48 L. R. A. 68.

Appellant's requested instruction No. 3 was properly refused for the reason that it assumed that the appellant had furnished the respondent with a reasonably safe place in which to work, the very question at issue. The other assignments of error are met by what is said on the questions of assumption of risk and contributory negligence.

The judgment is affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

ROOT, J. (dissenting).—Notwithstanding the profound respect which I entertain for the writer of the foregoing opinion and for my associates who concur therein, I cannot escape the conviction that they have, in this instance, fallen into error; and as I regard the error radical and susceptible of far-reaching, detrimental effects, I feel constrained to dissent, and to express my views upon the main question involved.

The majority opinion, upon the question of assumed risk, is based upon what this court said in *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; and what was there said upon said subject was based upon the case of *Narramore v. Cleveland etc. R. Co.*, 96 Fed. 298, 48 L. R. A. 68, wherein it was held that a defendant could not plead, or avail himself of the defense of, assumed risk, in an action by a servant for damages caused by the neglect of the master to comply with the provisions of a statute. In other words, it held that the principle of *Volenti non fit injuria* does not apply where a statute is violated, even though the statute does not so expressly provide. For the sake of brevity I will refer herein to this proposition as the "*Narramore* doctrine."

In the case at bar the trial court held, and respondent contends, that the act of March 6, 1903 (Laws 1903, p. 40), commonly known as the "Factory Act," cut off the defense of assumed risk where a servant sues for damages caused by dangerous machinery left exposed in violation of said statute. It is conceded that this respondent could not recover were

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it not for the factory act. It is admitted that "assumption of risk" would be a perfect defense herein but for said statute. Under the law of this state, up to the time said statute went into effect, said defense could be interposed in a case comprising the facts of the case at bar, and would constitute a complete bar to recovery. All of this is conceded by respondent herein. But it is contended that said factory act changed the law so that now a defendant cannot interpose said defense to such an action. As it is conceded that the change has been produced by this statute, let us examine it. Every effect must have a cause. If this statute has destroyed the defense of assumed risk, we will, of course, find therein the cause that has produced that effect. Here is the statute:

"An Act providing for the protection of employees in factories, mills or workshops where machinery is used and providing for the punishment of the violation thereof.

"Be it enacted by the Legislature of the State of Washington:

"§ 1. That any person, corporation or association, operating a factory, mill or workshop where machinery is used, shall provide and maintain in use proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys, proper safeguards for all vats, pans, trimmers, cut-off, gang edgers and all other saws that can be guarded advantageously, planers, cogs, gearings, belting, shafting, couplings, set screws, live rollers, conveyors, manglers in laundries and machinery of other or similar description. Exhaust fans of sufficient power shall be provided in the discretion of the commissioner of labor for the purpose of carrying off dust from emery wheels, grindstones and other machinery creating dust, where same is operated in an enclosed room or place. If a machine or any part thereof is in a dangerous condition, or is not properly guarded, the use thereof is prohibited, and a notice to that effect shall be attached thereto. Such notice shall not be moved until the machine is made safe and the required safeguards provided.

"§ 2. All hoistways, hatchways, elevator wells and wheel holes, as well as fly wheels and stairways in factories, mills, workshops, storehouses, warerooms or stores, shall be securely

fenced, enclosed or otherwise protected and due diligence shall be used to keep all such means of protection closed, except when it is necessary to have the same open, that the same may be used.

"§ 3. That any person, corporation or association operating a factory, mill, or workshop where machinery is used, shall provide in each workroom thereof proper and sufficient means of ventilation.

"§ 4. Any person, corporation or association who violates or omits to comply with any of the foregoing requirements or provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment for not less than fifteen days nor more than ninety days.

"§ 5. A copy of this act, together with the name and address of the commissioner of labor printed in a legible manner, shall be kept posted in each department of every factory, mill or workshop and in the office of every public and private work, upon the employer or his agent or superintendent being supplied with sufficient copies thereof by the commissioner of labor."

Having read the statute, let us ask some questions as to its contents. Does it say that "assumed risk" shall not be permitted as a defense where a violator of the statute is sued by a servant injured by reason of such violation? No. Does it say anything about "assumed risk?" No. Does it say anything about defenses of any kind? No. Does it directly or indirectly say anything about actions for personal injuries? No. Does it say that the penalty therein provided may be augmented by depriving the defendant in a damage case of the defense of assumed risk and thereby mulcting him in damages? Nothing of the kind. Does it say anything about civil liabilities or actions? Nothing. It is a criminal statute. Its provisions are clear and easily understood. Its language is plain. Its penalty is definite and expressed in unmistakable terms.

The purpose of a statute is to put in definite, concrete,

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enduring form the intention and decision of the state (acting through its lawmaking department) as to what the law shall be upon the subject-matter of such statute. That intention and that decision are expressed by, and must be gathered from, the language used. If the language be vague, ambiguous, indefinite, or uncertain, it then becomes the duty of the courts to construe it. If said language is susceptible of two or more constructions, the court may consider the general purpose of the statute, the evil (if any) sought to be corrected, and any other matters that will aid in arriving at the meaning the statute-makers intended to convey by the language employed. But if the language is plain and unequivocal, there is then no room for construction. The language must then be understood as having its usual and ordinary significance. The language of this factory act is clear, plain, and without ambiguity. Its meaning can be readily understood. When the legislature attempts to change the law of the state upon a given subject, by creating a statute covering such matter, the citizens of that state have a right to look to the language of such statute for the change intended and effected. The extent of the change must be ascertained from the terms of the statute itself. The court which gives to a statute a meaning which none of its terms sustain, is thereby *creating* law—a thing the court has no right to do.

Applying the foregoing facts and principles to the case at bar, it will be seen that there is no authority for holding that this statute destroyed the defense of assumed risk in a case of this kind, or any kind. There is nothing in the title or body of the statute expressing or indicating any such purpose. It being conceded that the defense would still be valid were it not for this statute, and it being shown that the statute does not mention or refer to the matter in any manner whatever, it would seem to be logically demonstrated that no change was made. It is axiomatic that a thing cannot be changed unless something changes it. It would seem to be

equally evident that a rule of law is not changed by a statute that does not mention, refer to, or in any manner deal with, said rule of law. If the legislature had intended this statute to cut off the defense of assumed risk, it could easily have placed therein language to evidence that intent. It did not do so. It gave no expression whatever of any such purpose. How this court can find that the legislature intended by this statute to defeat this defense, when the statute contains not a word indicating such an intention, is a query to which I have received no satisfactory answer.

Congress, in enacting a law requiring certain classes of railroad companies to use automatic car-couplers, expressly provided that the servant should not be deemed to have assumed the risk where the master violated said statute. To cut off this defense, Congress evidently deemed it necessary to expressly enact a provision to accomplish said result. It seemed to deem some expression of its intention essential to effectuate such purpose. Numerous legislatures have deemed it necessary, in order to prevent assumption of risk, to expressly provide therefor by statute. Code of Iowa (1897), §§ 2071, 2492; Laws of Texas, 1891, ch. 24, p. 25; Laws of Florida, 1891; Laws of Wyoming, 1890-91, ch. 28, p. 141; 2 Burns' Ann. Ind. Stats. (1901), § 7087, subd. 5. I think our legislature would have done the same had it intended to accomplish the result mentioned.

If anything further were necessary to show that the legislature did not intend to cut off this defense, it may be found in the history of this legislation. The bill which became the factory act was introduced in the legislature at the same time with another bill expressly providing for the cutting off of the defense of assumed risk in this kind of an action. This bill was known as the "assumed risk bill." It and the factory bill were before the same legislature at the same time. The factory bill was passed; the assumed risk bill was defeated. Now this court is asked to do what the legislature refused to do. If its originators believed that the

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factory bill would have the effect, when enacted, of cutting off assumed risk, why did they introduce a separate bill for that express purpose? If the legislature intended to prevent the plea of assumed risk, why did it not pass the bill then before it providing for that very purpose? Why did it defeat that bill if it desired its contents to become the law? The passage of the assumed risk bill, or the incorporation of its substance in the factory bill, would have been a natural course to have pursued had the legislature intended to prevent the defense in question. In the face of a record like this, we are asked to hold that the legislature intended the factory act to cut off this defense—that it intended the courts to hold that the proposition which it defeated should be read into a separate and distinct statute, passed at the same session, which statute neither mentions nor refers to the matter in any manner whatever. I cannot bring myself to believe that the legislature intended to be considered as having enacted a proposition which its record shows to have been before it for consideration and to have been voted down.

But several contentions are made by respondent and by the few courts adhering to this doctrine, in its support. First: It is urged that the statute would be a “dead letter” and ineffective if it be not given such force. Second: It is argued that assumed risk is based upon contract, and that to permit such defense in a case like this would be to permit master and servant to contract to violate the law. Third: It is claimed that the welfare of employees, as a class, requires such an effect to be accorded the statute. Fourth: It is insisted that this court is committed to this doctrine by reason of its decision in the case of *Green v. Western American Co.*, *supra*. It will be seen that these arguments fail to meet the proposition that the factory act does not assume to make any change in the pre-existing law as to assumed risk. Every one of these arguments ignores this proposition. None of them can prevail against this material, indisputable fact, which stands at the threshold of this inquiry.

Let us notice these arguments *seriatim*. The contention that the court must accord this effect to the statute or otherwise the evident purpose of the statute (to make the working place of employees as safe as possible) will not be attained, is an argument, the impropriety of which is readily apparent. In order to make the statute effective this court is asked to import a provision which the legislature never placed therein. The statute is penal. The penalty for violating its terms is clearly expressed. But we are told that this penalty is not sufficient to make mill owners obey the statute. We are told that it will be a "dead letter" unless this court adds to the penalty by taking from a violator the benefit of the defense of assumed risk. The size and character of the penalty of this statute were matters for the legislature to determine. It did so. For this court to say that the legislature exercised poor judgment and did not prescribe a penalty sufficient to make the statute respected and effective, would be to indulge in a criticism upon a coordinate branch of the government concerning a matter resting peculiarly in its province. For this court to attempt to remedy an alleged ineffective statute by adding thereto, or importing therein, a provision not placed there by the legislature, would be a clear case of usurpation. Suppose the trial court had made a formal order to the effect that there should be added to the factory act the following words, to wit: "No mill owner when sued by an employee for damages caused by the violation of this statute shall be permitted to plead the defense of assumed risk." Would this court uphold such an order? If it should do so, would anybody doubt that its action was in defiance of all constitutional authority? Now, the superior court did not by an order add, or assume to add, those words to the statute. But it did something which had the same result. It gave the statute the force that it would have if those words were incorporated therein. It gave to the statute a meaning which its language did not justify and which it could only have by treating it as containing

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the words above referred to. If a court can give a statute a meaning and effect which none of its language conveys or produces, there would seem to be no logical reason why it might not order the statute amended by adding the words which would express such meaning and effect. That the court cannot legally add language to a statute will, of course, be conceded. It would seem to be equally clear that the court cannot add to a statute a meaning and effect which is not therein expressed in any form whatever.

In justice to the trial judge it should be stated that the record shows that he based his rulings regarding this question upon the case of *Green v. Western American Co.*, *supra*. If this court holds this statute to have the effect respondent contends for, it will, in my opinion, be a clear case of judicial legislation. So long as a statute is constitutional, it is not for the court to say that the legislature failed to accomplish what it desired, or what it ought. The moment the court does this, it transcends its constitutional powers. We are to deal with statutes as enacted; not as we may think they ought to be. If the court can add to or take from, or otherwise modify, the valid provisions of one statute, it can do the same with any other statute. If this court can legally add to this statute the effect sought by respondent, there would seem to be no reason why it might not add to any statute any provision (in effect) which in its opinion would be an improvement on the work of the legislature. The confusion to follow the adoption of such a doctrine can be readily foreseen. Hence it must be evident that this court can give no heed to the argument that this statute would be ineffective and a "dead letter" unless construed to have an effect which its terms are incapable of producing. Such argument is proper to be addressed to the legislature. It invokes the exercise of legislative power. The constitution has not vested the courts of this state with such power.

The argument that to permit the defense of assumed risk in this case would be to allow master and servant to contract

for a violation of the law, is clearly illogical and unsound. Under the common law, as it existed in this state at the time of the passage of the factory act, it was the duty of the master to give the servant a reasonably safe place in which to work. A master permitting a servant to work about a dangerous set screw, situated as was the one that injured this respondent, would be clearly guilty of negligence. Under this statute, he is likewise guilty. As applied to the facts of this case, the statute made no change in the duty of appellant to respondent. It is conceded that appellant could have pleaded "assumed risk" under the common law. If it was not unlawful for the servant to assume the risk when the common law required the master to furnish him a safe place, why is it unlawful because the statute makes the same requirement? The duty of the master is the same in each instance. A duty imposed by common law is just as binding as one imposed by statute. *Langlois v. Dunn Worsted Mills* (R. I.), 57 Atl. 910.

A contract void because obnoxious to a statute would also be void if contravening an established principle of the common law. A contract to commit a felony would be void regardless of whether the contemplated crime were an infraction of statute or the common law. The converse of each of these propositions is equally true. A contract that is not inimical to a given principle of the common law is not antagonistic to the same principle when enacted as a statute. An executory contract to violate a valid statute would not be enforceable. It would make no difference whether it were a penal statute or otherwise. But such contract would be virtueless not merely because it provided for violating a *statute*, but because it contemplated the violation of the *law*. A contract to violate an unconstitutional statute would not be void. It is not the *form* of the law that makes an agreement to violate it impotent; it is the *fact* that it *is* the *law*.

If the duty of the master to furnish a safe place, and the obligation of the servant to assume open and apparent dan-

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gers, were solely matters agreed to by them in the contract of employment, it would make no difference whether these obligations were imposed by statute or common law. In the absence of statutory restriction—and the statute in question has none—the same defenses are available in these actions as were permitted before the statute was enacted. The argument of respondent upon this point is based upon the theory that “assumed risk” rests upon contract. This theory is correct, if at all, only in a qualified sense. Instead of arising from the contract of employment made by the parties, it is based upon broader grounds, considerations involving the contract, public policy and the *status* which the parties acquire by reason of the employment and the conditions surrounding the working place. The doctrine *Volenti non fit injuria*—“One who knowing and appreciating a danger voluntarily assumes the risk of it”—is so in accord with common sense and right that its application cannot be deemed to have been denied unless by language clearly evidencing such an intention.

When a master and servant enter into a contract of employment, a condition or *status* is created which the law deems a matter of public concern. Therefore, the law steps in and imposes certain reciprocal duties and obligations upon each of the contracting parties. It says to the master: “Public policy requires that you give the servant a reasonably safe place in which to work; this obligation is therefore imposed upon you.” It says to the servant: “Public policy requires that you use your faculties, as an ordinarily prudent man would, to avoid injury.” It says further to the master: “If you negligently fail to keep the servant’s working place reasonably safe, you must respond in damages if such negligence causes him injury.” It says further to the servant: “You must assume such dangers of your working place as are open and apparent to you.” The theory of respondent is that all of these matters are read into the employment contract; that they are parts and parcels of the employment

agreement. This is not the case. They are not portions of the agreement. They are more than that. They are obligations placed upon the respective parties by operation of law, and are so imposed from considerations of public policy. The state, having an interest in the safety and health of its citizens, provides that while employed as servants they must be furnished with reasonably safe working places. It also recognizes the fact that many kinds of work must be necessarily done in places where dangers cannot be entirely eliminated. Men who work in such places ordinarily get higher wages by reason of said dangers. The work must be done. Somebody must do it. The law says to the servant: "Yes, you may contract to work in the presence of those known dangers, but it is only fair that you assume the risk of injury therefrom; therefore, this liability is placed upon you." The servant does not agree to this burden as a part of his contract. It is not a matter of his agreement. It is an obligation imposed upon him by the law. It becomes applicable to him because of his *status* as a servant working in such a place.

That it is not a part of his contract, in the ordinary sense, may be seen from the fact that he and the master cannot make a valid agreement for him not to assume the open and apparent dangers, any more than they can make a binding agreement releasing the master from the duty of furnishing a safe place. These are reciprocal duties of master and servant, which cannot be made the subject of contract, and the law sanctions no contract releasing either from these duties by law imposed upon them respectively. They were imposed by the common law and have not been changed by the statute. If assumed risk were a matter of contract, it could, by agreement of the parties, be dispensed with in any given case. So could the duty to furnish a safe place under common law; but the law never sanctions an agreement for such waiver. But it does release each under certain circumstances. For instance, a servant working under a master's

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promise to repair is exempted from assuming the risk; and a master is exempted from liability for injuries caused by dangers which to the servant are open and apparent. Neither of these exemptions occurs as a consequence of agreement, but they are the result of the law applicable to the given conditions.

To show that the assumption of risk is not merely a matter of contract, let us use the following illustration: A servant agrees to work for five years at a given compensation in a mill where he knows that the machinery is not guarded. After working there a year, the legislature enacts a statute requiring that machinery to be guarded and expressly cutting off the assumption of risk and the right to plead the same. The master ignores the statute and the servant is injured by reason of said neglect. He sues. The master pleads "assumed risk." The servant sets up the statute. The master says the statute is unconstitutional, because it impairs the obligation of his contract with the servant, wherein the latter impliedly agreed to assume the risk. Would a court hold this contention good? Not at all. Yet it would be absolutely good if the assumption of risk were merely a matter of contract.

One kind of a valid contract cannot be impaired any more than another. No attempt is made by the statute to do away with any of the obligations of master or servant. The factory act merely puts in statutory form the principle, long existing, which requires the master to make the working place reasonably safe. It requires certain things to be done in order to have the working place regarded as reasonably safe. In order that this duty of the master might be better observed, the statute made its neglect a criminal offense punishable by fine. The statute says nothing about releasing the servant from any obligation then existing at law. Its purpose was to make applicable in certain cases, and secure the enforcement of, the common law, already existing; to compel, by fear of penalty, the performance by the master of cer-

tain acts deemed by the statute-makers as essential to the performance of his common-law duty of furnishing a safe place to the servant. The effect of the statute was to make the omission of these specified acts conclusive proof of neglect of duty to the servant and to render the master criminally liable therefor. It was never intended to affect the contractual relations of the parties, other than as above stated. It did not remove, or assume to remove, any of the duties imposed by common law upon the servant. It said nothing on the subject and does not directly or indirectly refer thereto. No restrictions upon the right to contract are made by the statute. No change whatever being made as to the obligations of the servant, it follows that he was still charged with the duty of using his faculties to avoid danger and with the burden of the risk of open and apparent dangers. Being placed by law under these obligations, they may be pleaded against him.

When respondent entered appellant's employ, he did not by his contract agree to assume the risk from open and apparent dangers, but he knew that the law imposed that assumption upon him. He knew that he assumed the risk from this set screw, which for two weeks he saw constantly rendering his working place dangerous. As he elected to continue work beside this open danger, public policy and good conscience forbid that he should now be permitted to say that the law as to assumption of risk should not be applied to him. This defense can be interposed against him not because he agreed that it might, but because the law says it may. Having voluntarily accepted an employment and continued to work under conditions that he knew made him subject to the application of the doctrine of assumed risk, he is now estopped to say that it should not be applied. The law forbids him to complain of the master's omission, which he tacitly, if not expressly, consented to by working in the place known by him to be dangerous by reason of said omission.

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As to the argument that the welfare of employees as a class requires that this statute be given the force contended for by respondent, I regard the same as both unsound and mischievous. For this court, in order to favor a certain individual or special class of people, to read into a statute something which the legislature never placed therein, would be to undermine one of the fundamentals of our government. "Equality before the law" is the priceless heritage of every American citizen. The rich and the poor, the great and the small, the pauper and the millionaire, the workingman and the capitalist—are each and all entitled to every right the law gives and should be required to bear every burden the law imposes. The law is no respecter of persons; and the moment a court assumes to distort a statute, or "bend" the law, as a favor to one and a disadvantage to another, that moment violence is done to one of the most sacred principles of our constitutions. In dealing with questions arising from the relations of capital and labor, or master and servant, there is but one proper method for courts to pursue, and that is to interpret the law fairly, honestly, and with absolute impartiality. Alike impervious to the influences of either class, the supremacy and dignity of the law should at all times be sustained by a fearless, firm, and unwavering hand. Neither employer nor employee has any right to ask or expect that statutes will be construed any differently for him, or by any other rule, than is done for other citizens.

While importing into this statute the substance requested by respondent would be to his advantage, it would react upon employees generally, as a wrongful decision or unjustifiable official act invariably does upon those intended to be its beneficiaries. Honest workingmen do not ask or expect anything wrong or illegal. They will not sacrifice their manhood or the honor and dignity of labor upon the altar of covetousness or demagoguery. They are entitled to a fair and fearless execution of every law calculated for

their benefit. Their rights and interests should be carefully and constantly upheld. And one of the greatest needs is protection from unwise friends who, in their name, too often ask for considerations unjust, illegal, and wrong. An unrighteous verdict and judgment favorable to a certain workingman is an injury to the workingmen as a class. It must frequently happen that the question of merit is a close one, of fact or law, and the bringing of such an action is in no wise reprehensible either on the part of plaintiff or his attorney.

In passing, I desire to say that, by reason of what was said in *Green v. Western American Co.*, I feel that respondent herein and his attorney were abundantly justified, as a matter of ethics, in prosecuting the case now at bar. But the error—as I conceive it to be—of that case should now be corrected, and the doctrine that a statute may be supplemented by a court so as to favor any special class should be repudiated. If we have a right to add to a statute in order to make it specially benefit mill operatives, we can, with equal right and propriety, do the same thing for the benefit of miners, brokers, farmers, bankers, corporations, trusts, or any other class we may, in a given instance, desire to favor. A statute such as the factory act directly affects one of the leading industries of our state and indirectly many others. If it and kindred statutes are not to be understood according to the plain import of their language, but are to be given such interpretation as the court may think most advantageous to employees, it can be readily seen that the situation will not be inviting to people having capital to invest in pursuits requiring the employment of labor. The greatest material need of our state at the present time is capital with which to develop our natural resources. No class of our people desire and need this more than our workingmen. Every decision such as respondent now asks for is a barrier to such investments; and the worst sufferers are the very workingmen in whose interest it is claimed

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such a decision would result. The best interests of capital and labor require that they go hand in hand. He that teaches a different doctrine is not a wise friend to either. Neither needs any consideration in the administration of the law except honesty, fairness, and impartiality. To these each is absolutely entitled as a matter of law, justice, and right. Capital is timid, and few things are better calculated to frighten it than uncertainties in the law and partiality and innovations in the manner of its administration by the courts. The highest welfare of our laboring people demands a fair, fearless, and impartial application of the law to capital according to established and recognized principles of jurisprudence. Such statutes as this factory act should be given a liberal construction, and every reasonable intentment should be accorded in order to effectuate the humane purpose intended. But construing a statute liberally is a very different thing from injecting into a statute a provision not there when enacted. The statute in question should be interpreted by the well-established rules which the law commonly employs in ascertaining the meaning of statutes. Otherwise, the jurisprudence of our commonwealth will be lacking in that certainty and stability essential to the welfare of a state.

Stare decisis. It is argued that what was said by the writer of the opinion in *Green v. Western American Co.*, *supra*, committed this court to the *Narramore* doctrine. In that case plaintiff was working as a miner for the defendant company. A statute made it the duty of the company to deliver, at a certain place, timbers to be used by plaintiff in making and keeping his working place safe. The company did not do this. Plaintiff complained. The company told him to go ahead with his work and the timbers would be promptly furnished him. Relying upon that promise, he did so, and was injured before the timbers came. The court held, very properly, I think, that he had a right to rely upon that promise. The law is well settled in this and

other states that a servant has a right to rely upon such a promise, and does not, during a reasonable period of time, assume the risk of dangers which the master, under said promise, is expected soon to provide against. Hence, the judgment in that case was justified upon that ground. As to whether or not the statute prevented the plea of "assumed risk," was a question entirely unnecessary to decide. But the learned judge who wrote the opinion saw proper to quote at length, with approval, from the case of *Narramore v. Cleveland etc. R. Co.*, *supra*, although he does not, at any length, discuss the question as an original proposition.

In view of these facts, I do not feel that the judges who signed that opinion should be regarded as irrevocably concluded by what was said upon a secondary question, in no manner essential to the conclusion reached upon the main issue. Neither do I think the court should now feel itself bound by the language of an opinion bearing upon a subsidiary question, which the court was not required to investigate, and upon which there was no occasion to express an opinion. But when that question comes as the paramount issue in the case, and its examination shows that the former language of the court was based upon a misconception of the law, and that to give such sentiments the force of decision would be to announce a principle at variance with the overwhelming weight of authority, against sound reason, contrary to well-established principles of jurisprudence, and detrimental to the best interests of the state—it would seem that the court's duty was plain. The doctrine of *stare decisis* is proper to be observed in appropriate cases. But it would be a startling proposition to assert that it must always be controlling. If there is any court that has not, at some time, changed its former rulings, I am not aware of it. The books furnish many instances of decisions having been subsequently overruled, and not infrequently by the same, or practically the same, personnel. See, *Birmingham R. & Elec. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20

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L. R. A. 457. This being true, how much less hesitancy should exist in a case where it is not a question of the court overruling a decision, but merely a matter of deciding correctly a question upon which it made lightly considered observations in a case where such question was unimportant and not decisive. Courts are composed of human beings. No human institution is perfect. That courts will sometimes fall into error is to be expected. It is unavoidable, in the nature of things. To pretend, or act upon the assumption, that they do not (as would be the effect of always being controlled by *stare decisis*) would be for a court to attribute to itself an infallibility it does not have, and which everybody knows it not to possess. The argument that a court cannot command respect if it reverses its decisions is sound only to the extent that it should not do so without good, potent reasons. But in personal affairs, honest and intelligent people have a profound respect for the man who, when he makes a mistake and detects it, has the moral courage to admit and correct it. A court that acts upon the same principle, so far as logically applicable, will not, on that account, be without the respect of right thinking people. This court now has before it the question of whether or not the *Narramore* doctrine shall be engrafted upon the law of this state. Few decisions of this court were as far reaching in their effects as will be this. The absolute uncertainty to arise from the adoption of this doctrine will materially embarrass all industrial activities in this state.

Let us now notice the authorities. This factory act has never been before this court for consideration. But it has been passed upon by United States District Judge Hanford, presiding in the circuit court, in the case of *Nottage v. Sawmill Phoenix*, 133 Fed. 979. He expressly declined to approve the *Narramore* doctrine, but held that the statute did not forbid the plea of assumed risk. The eminent and unquestioned ability of this experienced jurist must command, for the first judicial interpretation of this statute, the pro-

found respect of both bench and bar. Among other things, he said:

"This is a penal statute, enacted by the legislature in the exercise of the police power of the state, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employees any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law, nor does it prescribe an arbitrary rule of evidence, like the provision contained in the act of Congress making the use of automatic couplings on railroad trains compulsory, which prescribes, in effect, that trainmen shall not be deemed to have assumed the risk of injuries from their employment on trains not provided with automatic couplers. See U. S. Comp. St. 1901, vol. 3, p. 3176. . . . The courts have no authority to extend or amplify the provisions of statutes so as to make them comprehend additional rights and remedies which the legislature omitted to provide. A statute which is plain and free from ambiguities is not subject to judicial construction, but must be interpreted by the courts and enforced according to the legislative intention expressed by its words. It is not true that the purpose of the statute will be defeated by a decision of a controversy between individuals involved in a civil action in accordance with the long-established rules of the common law. It may be fairly inferred that the legislature did not intend to encourage this class of litigation, which is already stimulated to abnormal proportions by the solicitations of employment by specialists, but preferred, as a means of protecting employees in factories from the consequences of recklessness in the use of dangerous agencies, to make the unnecessary use of unguarded machinery criminal and punishable. The real intention of the legislature is made apparent by the fact that the law does not discriminate between employers and employees. It is not a law subjecting only the owner or manager of a mill or factory or an employer of labor to the penalties prescribed, but section 4 applies generally to every 'person, corporation or association who violates or omits to comply' with the requirements of the act. Section 1 provides that, if a machine is not

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properly guarded as required, the use thereof is prohibited; therefore an employee in a mill who operates an unguarded saw commits a prohibited act, and is a violator of the statute, and subjects himself to punishment as provided in section 4. . . . There is no substantial difference between an agreement which is unlawful because harmful and an agreement to do an act prohibited by a statute. In either case the unlawfulness of the agreement constitutes a bar to its enforcement by judicial proceedings."

The circuit courts of appeals of the Second and Eighth Circuits have passed upon statutes similar to our factory act, and have held that they did not cut off the defense of assumption of risk. That of the Seventh Circuit seems to have practically held likewise. The able attorney for respondent herein, noted for his industry and familiarity with the decisions, only claims five states as supporting the *Narramore* doctrine, viz: Indiana, Michigan, Missouri, North Carolina, and Vermont. Opposed to said doctrine, stand the courts of last resort of the following states, to wit: New York, Pennsylvania, Massachusetts, Illinois, Wisconsin, Minnesota, Alabama, Iowa, Rhode Island, and Colorado. Of the five states cited by respondent, the decisions in two of them (North Carolina and Vermont) appear to be affected by statutory provisions not to be found in our statutes. And in another of these states (Missouri), the United States circuit court of appeals held the other way—upholding the defense notwithstanding the statute.

In the *Narramore* case the writer of the opinion does not claim it to be in accord with the weight of American authority, but assumes to rest it upon English decisions. With due respect to the learned and distinguished jurist, I am led, by an examination of the cases, to believe that the English cases do not sustain his position. The principal English case upon which he relies is *Baddeley v. Granville*, 19 Q. B. D. 423, from which he makes a quotation, indicating a meaning which I regard as at variance with that of the opinion taken as a whole. The following cases will show that the

Narramore doctrine is not the law in England: *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; *Smith v. Baker & Sons*, [1891] A. C. 325; *Osborne v. London etc. R. Co.* 21 Q. B. D. 220; *Walsh v. Whiteley*, 21 Q. B. D. 371; *Britton v. Great Western Cotton Co.*, L. R. 7 Ex. 130.

In the case of *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, at page 509, the circuit court of appeals for the Eighth Circuit, in discussing a factory act similar to ours, said:

"The factory act of Missouri (2 Rev. St. 1899, § 6433) does not abolish the defense of assumption of risk in cases which fall under its provisions. In this respect it differs from the act of the Congress of the United States (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), which requires cars engaged in interstate commerce to be equipped with automatic couplers. Congress in that act expressly provided that in case the railroad companies failed to comply with its terms the employees should not be deemed to have assumed the risk thereby occasioned. Act March 2, 1893, c. 196, § 8, p. 532, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3176]. The Legislature of Missouri had power to apply a similar provision to cases in which employers failed to keep their machinery safely and securely guarded, but they did not do so. The negligence of the master to safely and securely guard his machinery in accordance with the provisions of the law of Missouri is of the same nature as his negligence in providing a reasonably safe floor or ax or other tool or appliance, and there is no reason why an action for a resulting injury should not be subject to the defense of assumption of risk in the one case to the same extent as in the other. And so it is under the law here under consideration."

The supreme court of Alabama, in an early case, made the same error that this court did in the *Green* case, concerning this same question. But when the matter came squarely before the court, and was thoroughly considered, as it was in the case of *Birmingham R. & Elec. Co. v. Allen*, *supra*, that court, in an able and exhaustive opinion, overruled its former holding and laid down the principle which I now contend

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for. Said court did not permit *stare decisis* to interfere with the correction of an error, when convinced that it had committed such. The opinion is instructive, reviewing many authorities, including the leading English cases on the question.

The court of appeals of New York, in *Knisley v. Pratt*, 148 N. Y. 372, 377, 42 N. E. 986, 32 L. R. A. 367, uses the following language:

"In order to sustain the judgment in favor of plaintiff it is necessary to hold that where the statute imposes a duty upon the employer, the performance of which will afford greater protection to the employee, it is not possible for the latter to waive the protection of the statute under the common-law doctrine of obvious risks. We regard this as a new and startling doctrine calculated to establish a measure of liability unknown to the common law, and which is contrary to the decisions of Massachusetts and England under similar statutes. . . . We think this proposition is essentially unsound and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common-law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy. . . . We are of opinion that there is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business as well under the Factory Act as otherwise. There is no rule of public policy which prevents an employee from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does indeed contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs."

The supreme court of Rhode Island, in *Langlois v. Dunn Worsted Mills* (R. I), 57 Atl. 910, 911, met this question squarely as follows:

"The question whether a plaintiff can recover for a breach of statutory duty notwithstanding an assumption of risk or contributory negligence on his part is one on which there is some difference of opinion, but we think the clear weight of reason and authority is against such recovery. A statutory duty is no more imperative in law than a common-law duty. A penalty may be imposed upon the offender for a breach of statute, but it does not change the relations between the parties, except to the extent that one entering the employ of another may assume, in absence of knowledge, that the terms of the statute have been complied with. . . . It is also well settled that a court will not presume that a statute is intended to change a rule of common law unless such an intent appears. . . . It has been common practice here and elsewhere to construe statutory duties in connection with assumed risks and contributory negligence. For example, ever since the advent of railroads, statutes have required the sounding of a bell or whistle in approaching a highway crossing. Yet, though the statute should be negligently disregarded, it has never been held that a plaintiff, seeing the approach of a train, and injured while attempting to cross ahead of it, could recover. He would be held to have assumed the risk of so crossing, or to have been guilty of contributory negligence. The mere fact that the railroad company had violated the statute would not warrant a recovery."

In the case of *Martin v. Chicago etc. R. Co.*, 118 Iowa 148, 91 N. W. 1034, 96 Am. St. 371, 59 L. R. A. 698, the court, in a well-considered opinion, discusses and disapproves of the *Narramore* case. Among other things the Iowa supreme court says:

"We think the learned judge, in writing that opinion, assumed too much, in treating the assumption of risk as purely a matter of contract. True, the books speak of it as resting on an implied agreement between the employer and employee. It is more accurate to say that the services of the one are engaged by the other, and from the relationship

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the law implies certain duties, obligations, and disabilities. No mention is made of these, but they pertain to the relationship of the parties and the status then assumed. . . . Nor can we approve of the distinction attempted to be drawn between employment under conditions condemned as dangerous at the common law, and those prohibited by a city ordinance. In the absence of an assumption of the risk, an omission of a duty implied by law is precisely as effective in fixing liability as though enjoined by statute. The obligation of the employer to the servant is no greater in the one case than in the other, and we can discover no sound reason for the discrimination which declares the danger in the one case may be assumed, and in the other may not. . . . Our study of the subject has led to the conclusion that, in the matter of assumption of risks, it is immaterial whether they arise from the violation of a common-law duty, or an obligation imposed by statute. . . . And it can make no difference whether the statute relates to the condition of the place where the work is to be done, or the method to be pursued in performing it. If the employe, with full knowledge of either, undertakes to accomplish the task assigned, at the place or in the method proposed, he ought not to be permitted to complain, when conditions and methods were precisely as he knew they would be, and to which he has assented."

The supreme court of Massachusetts, in *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161, speaks as follows:

"The doctrine of assumption of the risk of his employment by an employe has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. . . . The statute

does not attempt to take away the right of the parties to make such contracts as they choose, which will establish their respective rights and duties. . . . It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place, and from the kind or quality of the machinery used. Nothing but the plainest expression of intention on the part of the legislature would warrant giving the statute such an interpretation."

In *Swenson v. Osgood & Blodgett Mfg. Co.*, 91 Minn. 509, 512, 98 N. W. 645 (decided in 1904), the supreme court of Minnesota employed this language:

"Very much stress was laid upon the fact that by the laws of this state (Laws 1893, p. 99, c. 7, § 1; G. S. 1894, § 2248) the employer's obligation to properly protect and guard these cogwheels in a practicable manner had been made a statutory duty; but we have held, upon a previous consideration of this statute, that it does not change the general or common-law rule as to contributory negligence, or as to the assumption of risks by the employee."

Endlich, Interpretation of Statutes, § 5, says:

"What is called the 'policy' of the government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute. The clear language of a statute can be neither restrained nor extended by any consideration of supposed wisdom or policy. So long as a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. The language of Mr. Justice Story, concerning constitutional construction, applies almost equally to that of statutes: 'Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey; nor, if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience.'"

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And in § 7 the author continues:

"In short, when the words admit of but one meaning, a court is not at liberty to speculate on the intention of the Legislature, or to construe an act according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. 'The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a sea of troubles. Difficulties and contradictions meet us at every turn.' Indeed, to depart from the meaning on account of such views, is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute; it is, to expound it."

Black, Interpretation of Laws, § 4, says:

"The wisdom, policy or expediency of legislation is a matter with which the courts have nothing whatever to do. Whether or not a given law is the best that could have been enacted on the subject; whether or not it is calculated to accomplish its avowed object; whether or not it accords with what is understood to be the general policy of legislation in the particular jurisdiction,—these are questions which do not fall within the province of the courts. And hence a court exceeds its proper office and authority if it attempts, under the guise of construction, to mould the expression of the legislative will into the shape which the court thinks it ought to bear. The sole function of the judiciary is to expound and apply the law. To enact the law is the prerogative of the legislative department of government. Nor can the courts correct what they may deem excesses or omissions in legislation, or relieve against the occasionally harsh operation of statutory provisions, without danger of doing more mischief than good."

In *Powell v. Ashland Iron & Steel Co.*, 98 Wis. 35, 41, 73 N. W. 573, the supreme court of that state said:

"In such a case it is immaterial that the danger might be guarded against by the employer, even if failure in that re-

spect be a violation of some statutory requirement on the subject. The responsibilities which, by the rules of the common law, the servant must assume and discharge for his own safety, are not affected thereby unless the statute expressly so provides."

The same court, in the case of *Helmke v. Thilmany*, 107 Wis. 216, 221, 83 N. W. 360, spoke as follows:

"They cite the statute requiring the owner or manager of any factory, workshop or other place where labor is performed to keep 'all belting, shafting, gearing, hoists, fly-wheels, elevators and drums therein, *which are so located as to be dangerous to employees in the discharge of their duty,*' securely 'guarded or fenced.' Sec. 1636j, Stats. 1898. There is no claim, nor ground for claiming that such statute precludes the defense of contributory negligence, nor the assumption of risk. *Thompson v. Edward P. Allis Co.*, 89 Wis. 523, 530. Similar statutes have been construed the same way. *Curry v. C. & N. W. R. Co.*, 43 Wis. 665, 683; *Holum v. C., M. & St. P. R. Co.*, 80 Wis. 299; *Dugan v. C., St. P., M. & O. R. Co.*, 85 Wis. 614; *Schneider v. C., M. & St. P. R. Co.*, 99 Wis. 387."

The majority opinion cites three Illinois cases. I think an examination of them will show that they are affected by statutory provisions which we do not have. The Illinois supreme court, in a case later than those cited, used the following language:

"Whether injuries which occur because of the violation by the master of municipal regulations enacted for the preservation of life and limb should be regarded as wilfull and not subject to the defense of contributory negligence, or to the defense of the implied assumption by the servant of the risks and dangers caused by such violation, is a question of public policy for the legislature, and not one for the courts. We can only apply the law as it is. *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 235, 60 N. E. 815."

This language seems to show very plainly that the court does not cut off the defense of assumed risk unless the legislature has provided for so doing.

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Dresser, Employers' Liability, § 82, says:

"When a person engages to work for another, both a contract and a *status* are created. . . . Although the contract of hiring depends upon the same principles as other contracts, yet it has one peculiarity, in that it creates a *status* or relationship between the parties to which the policy of the law has affixed certain rights, duties, and disabilities to be observed by each, irrespective of any understanding or supposed agreement between them. These duties and disabilities arise when the relation is created, and continue until it ends, and for the most part are determined by the condition of affairs when the contract of hiring is made. It is usual and convenient to treat them as terms of an implied contract; but it is a contract implied from the relationship, and not from the agreement of the parties, and has none of the incidents of a technical contract."

2 Labatt, Master and Servant, §§ 649, 650, says:

"The general theory upon which the courts have proceeded is that, in the absence of language evincing a contrary intention on the part of the legislature, a statute which so far changes the common law as to impose upon a master duties to which he had not been before subject, or to render him liable for the negligence of certain classes of servants resulting in injury to other servants whose right of action would, if common-law doctrines were applied, be barred by the rule as to fellow employees, should not be construed in such a sense as to preclude the master from availing himself of any of those defenses which, as explained in § 255, *ante*, are based upon the fact that the injured person adopted a certain course of conduct with a full appreciation, actual or constructive, of the risk from which his injury eventually resulted. . . . In some instances the statutory provisions which are considered in this and the following chapters operate so as to convert what would be an ordinary risk under the common law into an extraordinary one. But unless this be their effect, they are not deemed to change in any way the rule that a servant assumes all the ordinary risks which are manifestly incident to the employment."

It must be remembered that some states have statutes expressly cutting off assumed risk, or expressly giving a right

of action for violation of the statute, in such terms as to effect that result—as will be shown by an examination of some of the cases cited in the majority opinion and by respondent.

The following authorities will show the attitude of the American courts and text-book writers upon this question, to wit: *Nottage v. Sawmill Phoenix*, 133 Fed. 979; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495; *Cleveland etc. R. Co. v. Baker*, 91 Fed. 224; *Martin v. Chicago etc. R. Co.*, 118 Iowa 148, 91 N. W. 1034, 96 Am. St. 371, 59 L. R. A. 698; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Birmingham R. & Elec. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270, 28 Atl. 1087; *Swenson v. Osgood & Blodgett Mfg. Co.*, 91 Minn. 509, 98 N. W. 645; *Williams v. J. G. Wagner Co.*, 110 Wis. 456, 86 N. W. 157; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360; *Langlois v. Dunn Worsted Mills (R. I.)*, 57 Atl. 910; *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, 46 Am. St. 299, 26 L. R. A. 435; *Grand v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; *McGinty v. Waterman (Minn.)*, 101 N. W. 300; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *White v. Wittemann Lith. Co.*, 131 N. Y. 631, 30 N. E. 236; *Honor v. Albrighton*, 93 Pa. St. 475; *Anderson v. Nelson Lum. Co.*, 67 Minn. 79, 69 N. W. 630; *Fleming v. St. Paul etc. R. Co.*, 27 Minn. 111, 6 N. W. 448; *Chicago Packing & Provision Co. v. Rohan*, 47 Ill. App. 640; *Munn v. Wolff Mfg. Co.*, 94 Ill. App. 122; *Keenan v. Edison Electric Illum. Co.*, 159 Mass. 379, 34 N. E. 366; *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484; 2 Labatt, Master & Servant, §§ 649, 650; 3 Elliott, Railroads, § 1315; 20 Am. & Eng. Ency. Law (2d ed.), 127; Dresser, Employers' Liability, §§ 82, 116; Bailey, Master's Liability, p

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480; 13 Law Mag. & Rev., 19; Roberts & Wallace, Duty and Liability of Employers, 136, 146, 160, 161, 260; Buswell, Personal Injuries, §§ 207-209; Endlich, Interpretation of Statutes, §§ 5, 7; Black, Interpretation of Laws, pp. 8, 234.

I think an examination will convince any one that the weight of authority is against the *Narramore* doctrine; and I believe the better reasoning to be decidedly so.

The justification for expressing my views at such length must be found in the importance of the question involved, and in the apprehension I feel in contemplating the far-reaching effects of the court's decision. It seems to me that the decision obliterates old landmarks of the law, and establishes an innovation neither justified nor desirable.

RUDKIN and CROW, JJ. (dissenting)—Believing that the majority opinion is unsound in principle and against the great weight of authority, we concur in the foregoing dissent.

• (No. 5619. Decided August 4, 1905.)

CHARLES J. PRIOR, *Respondent*, v. E. EGGERT, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE SAW—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a finding of defendant's negligence where it appeared that the trim saw which plaintiff operated wobbled at times, and long prior to the accident had been warped, buckled, and otherwise injured, and was dangerous to use, and complaint had been made thereof.

SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS. A charge that the defense of contributory negligence must be proved by defendant, by a preponderance of the evidence, is not objectionable as charging that it must be proved by defendant's evidence.

SAME—DAMAGES—INJURY CAUSING LOSS OF TIME—NO EVIDENCE OF VALUE OF TIME—INSTRUCTIONS—NECESSITY OF REQUEST. A charge allowing damages for loss of time during a disability occasioned by

¹Reported in 81 Pac. 929.

the loss of a thumb, where the evidence showed incapacity to work for six weeks, but did not show the value of plaintiff's time, is not prejudicial error, where it appeared that the plaintiff was capable of and had been operating a trim saw for a living, especially in the absence of any request for different instructions.

DAMAGES—EXCESSIVE. A verdict for \$830 damages for the loss of a thumb, cut off at the first joint, and for six weeks loss of time, is not excessive.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered December 3, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the operator of a saw in a mill. Affirmed.

Cooley & Horan, for appellant, to the point that it was error to charge the jury that they might consider the plaintiff's loss of time in the absence of any allegation or evidence of the value of his time, cited: *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806; *Howells v. North American Transp. & Trad. Co.*, 24 Wash. 689, 64 Pac. 786; *Britton v. Street R. Co.*, 90 Mich. 159, 51 N. W. 276; *Cousins v. Lake Shore etc. R. Co.*, 96 Mich. 386, 56 N. W. 14; *Reed v. Chicago etc. R. Co.*, 57 Iowa 23, 10 N. W. 285; *Nichols v. Dubuque etc. R. Co.*, 68 Iowa 732, 28 N. W. 44; *Winter v. Central Iowa R. Co.*, 74 Iowa 448, 38 N. W. 154; *Eckerd v. Chicago etc. R. Co.*, 70 Iowa 353, 30 N. W. 615; *Leeds v. Metropolitan Gas-Light Co.*, 90 N. Y. 26; *Staal v. Grand St. etc. R. Co.*, 107 N. Y. 625, 13 N. E. 624; *Page v. Delaware etc. Canal Co.*, 34 App. Div. 618, 54 N. Y. Supp. 442; *International etc. R. Co. v. Simcock*, 81 Tex. 503, 17 S. W. 47; *Galveston etc. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521; *Texas etc. R. Co. v. Bigham* (Tex. Civ. App.), 30 S. W. 254; *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Coontz v. Missouri Pac. R. Co.*, 115 Mo. 669, 22 S. W. 572; *Slaughter v. Metropolitan St. R. Co.*, 116 Mo. 269, 23 S. W. 760; *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347, 12 S. W. 636; *Smith v. Chicago etc. R. Co.*, 108 Mo. 243,

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18 S. W. 971; *Little Rock etc. R. Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097, 25 L. R. A. 386; *Tomlinson v. Derby*, 43 Conn. 562.

Robert A. Hulbert, for respondent, contended, *inter alia*, that where the nature of the injury naturally causes loss of time, no specific allegation is necessary. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. 175, 5 L. R. A. 498; *Hoffman v. Franklin County*, 90 Iowa 185, 57 N. W. 703. Evidence that he was laid up six weeks cured any defect in the pleading. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978. The amount of wages lost in the case of a common laborer need not be proved. *Watson, Damages*, § 487; *Loe v. Chicago etc. R. Co.*, 57 Mo. App. 350; *Feinstein v. Jacobs*, 37 N. Y. Supp. 345; *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. 601; *Chicago City R. Co. v. Hastings*, 136 Ill. 251, 26 N. E. 594. He was entitled at least to nominal damages. 8 Am. & Eng. Ency. Law (2d ed.), 555; *Watson, Damages*, § 18; *Leeds v. Metropolitan Gas-Light Co.*, 90 N. Y. 26; *Mabrey v. Cape Girardeau etc. Road Co.* (Mo. App.), 69 S. W. 394. Specific instructions should have been requested limiting the recovery to nominal damages. *Watson, Damages*, § 486; *Seitz v. Dry-Dock etc. R. Co.*, 10 N. Y. Supp. 1; *Niendorff v. Manhattan R. Co.*, 4 App. Div. 46, 38 N. Y. Supp. 690; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544; *Browning v. Wabash Western R. Co.*, 124 Mo. 55, 27 S. W. 644.

Root, J.—Respondent, a man twenty-seven years old, was employed by appellant in the operation of a trim saw in the latter's shingle mill, when his right thumb was cut off at the first joint. He had been using said saw about five weeks prior to the accident, and had worked but little about machinery theretofore. It was shown by the evidence that, for some time before the day of the accident, the saw that respondent was operating would at times "wobble" and run

improperly. On the day of the injury the saw was acting so badly that respondent complained thereof to the filer, who was charged with the duty of keeping the saw in proper condition, and the mill was stopped, and the saw taken out, examined, and filed by said filer. Respondent was not present while this was being done.

The saw having been filed and replaced and the mill started, respondent resumed his work, and was injured about two hours thereafter. He testifies that he supposed the saw had been repaired so as to run safely, and did not discover anything different until the accident occurred. He describes the occurrence in the following language: "Oh, we worked for perhaps two hours, or something like that, afterwards, and I had a block to be cut off, and all at once the saw wobbled and turned the block around and drew my hand right into the saw." This evidence was not disputed, although there was some evidence to show it unlikely that the accident so happened, and some tending to prove statements of respondent somewhat inconsistent with this version. Respondent recovered judgment in the sum of \$830. A motion for a new trial was interposed and denied. From the judgment this appeal is taken.

It is urged by appellant that no negligence is established against him. Respondent and two or three of his witnesses testified to facts showing that the saw had, long prior to the accident, been warped, "buckled," and otherwise injured, and had been at times dangerous to use. Respondent's testimony, together with that of his witnesses as to the defective condition and dangerous action of the saw, was sufficient, if believed by the jury, to sustain a charge of negligence against appellant.

In his charge to the jury, the trial judge used the following expression, to wit: "The burden of proving contributory negligence is on the defendant, and it must be proved by defendant by a preponderance of the evidence." Appellant contends that the words, "by defendant," render

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the instruction misleading; that the jury may have gathered the idea therefrom that this defense must be established by the evidence of defendant's witnesses only. We do not think this contention can be upheld. The trial judge did not say that the defense must be sustained by the evidence of defendant, or of his witnesses, but that it must be "proved by the preponderance of *the* evidence." This would clearly indicate a preponderance of *all* the evidence.

In the charge as to damages, the court, among others, gave the following instruction: "The elements entering into this damage, if he has sustained any, are as follows: (1) For all of his time during the period he was disabled by the injury." It is in evidence that respondent was incapacitated for work during a period of six weeks, but there is no evidence as to the value of his time or as to what he might have earned during said period, other than what might be inferred from the character of the work and respondent's age, experience, and capacity for labor, and from his evidence, wherein he said: "It was my business at that time, because I had to do something in order to live." The allegations of damage in the complaint are as follows:

"That by reason of said injury the said plaintiff has suffered the permanent loss of a portion of his right thumb, and has suffered great pain on account thereof; that plaintiff's right hand, by reason of the loss of a portion of his thumb, is permanently disabled and disfigured, to plaintiff's damage in the sum of \$5,000 dollars; that the said plaintiff has expended the sum of twenty (\$20) dollars for medical and surgical aid on account of said injury."

Appellant urges that these allegations and the evidence afford no justification for the instruction above set forth. We do not conceive this argument to be well founded. In the first place, the removal of a portion of the thumb is a permanent injury. The nature and extent of this maiming is not in dispute. It was therefore for the jury to say what damages respondent sustained by reason of such per-

manent injury. The jury could, and should, have taken into consideration the time already past and the future. While there was no evidence as to the amount of his earning capacity, it was in evidence that he was capable of running a trim saw, and that he was performing this work for a living. From this it conclusively followed that he suffered some damages by loss of time. As pain, suffering, and disfigurement were shown, and as a permanent injury was sustained which the evidence showed would interfere with operating a saw, and with doing clerical work such as he had formerly done, it was for the jury to consider all of these matters in arriving at the amount of their award. We cannot say that any amount was allowed for the time he was disabled. We cannot say that anything more than nominal damages were allowed for that period—which would have been justifiable. It does not appear that appellant requested the trial court to give other or different instructions than those given. Had appellant believed that there was no evidence to sustain the instruction complained of, he could have requested the court so to instruct. Such would have been proper practice. *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806.

There is nothing to show that the jury allowed compensation for an element of damage as to which there was no evidence. There must, of course, be evidence to show the damages for which a verdict is rendered. But where, as in this case, the damages for several injurious results are alleged in one lump sum, and no request is made by defendant for a segregation, we cannot say that such an instruction as is here complained of, can be said to have been prejudicial—especially in the absence of any request for a different instruction. While the criticized instruction might be erroneous and prejudicial if the only damages alleged were for loss of time, and might not be proper in some other cases, yet under the allegations and circumstances found here, we cannot say that appellant was prejudiced by the giving thereof.

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The fifth ground of the motion for new trial was as follows, to wit: "Because said verdict is excessive and appears to have been given under the influence of passion or prejudice." But little is said of this in appellant's brief. While the amount allowed by the jury is liberal, the majority here do not feel that the record is such as to justify this court in making a reduction.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, RUDKIN, and FULLERTON, JJ.,
concur.

(No. 5488. Decided August 7, 1905.)

ALICE M. JOMSLAND, by *Andrew O. Jomsland, her Guardian
ad Litem, et al.*, Appellants, v. NORRIS WALLACE,
Respondent.¹

FRAUDS—STATUTE OF—ORAL AGREEMENT TO CONVEY LAND—PART PERFORMANCE—JOINT OWNER HOLDING TITLE IN TRUST. There is such part performance of a verbal contract to convey land as to take the same out of the operation of the statute of frauds, where it appears that it was purchased by the parties jointly, and title taken in the name of the plaintiff in trust, who verbally agreed to deed to the defendant upon payment of the full consideration, that defendant went at once into the possession of the land, and had fully paid the consideration, and performed his part of the contract.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered July 23, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, decreeing the specific performance of a contract to convey land, upon defendant's counterclaim, in an action to recover possession of land. Affirmed.

Danson & Huneke, for appellants.

W. D. Scott and *H. M. Stephens*, for respondent.

¹Reported in 81 Pac. 1094.

CROW, J.—Action to recover possession of the northeast quarter of Sec. 12, Tp. 26, north, of range 43 E., W. M., in Spokane county, Washington. Appellant Andrew O. Jomsland is the father of appellants Alice M. Jomsland, Orlando C. Jomsland, Ida Tibbetts, and Amanda E. Wallace; while respondent Norris Wallace is the son-in-law of appellant Andrew O. Jomsland, and husband of appellant Amanda E. Wallace.

Respondent, by way of affirmative defense, in his answer alleged that, on or about the —— day of November, 1899, said Andrew O. Jomsland and respondent entered into a verbal agreement whereby they purchased the above described real estate, and also the southeast quarter of section 1 in the same township and range, from one E. J. Dyer, trustee, for the sum of \$6,400; that at said time it was agreed by and between said Andrew O. Jomsland and respondent that the title to said real estate should be taken in the name of appellant Andrew O. Jomsland; that one-half thereof, to wit, the northeast quarter of said section 12, being the land in dispute, was to be held by him in trust for respondent, and deeded to respondent as his own property, as soon as the full purchase price therefor had been paid, and the southeast quarter of said section 1 was to be retained by said Andrew O. Jomsland as his separate property; that said purchase price was to be paid by the advancement of a portion thereof by said Andrew O. Jomsland, and the residue was to be procured from the proceeds of said land and other lands owned by said appellant Andrew O. Jomsland, and also by the joint efforts and services of appellant and respondent upon all of said lands; that respondent's personal services were of a value greatly in excess of appellant's; that in pursuance of said verbal agreement respondent and his wife, Amanda E. Wallace, early in the year 1900, moved upon, and took possession of, said northeast quarter of section 12, as their own property; that respondent ever since has been in possession thereof; that respondent made certain

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improvements thereon; that the purchase price for said land had been fully paid by appellant and respondent in the manner stipulated, prior to the commencement of this action, and that said agreement has been fully performed, save and except that said Andrew O. Jomsland has failed and refused to convey said real estate to respondent. It is also alleged by said answer that said real estate was to become, and that it now is, the community property of said respondent and Amanda E. Wallace, his wife.

All the material allegations of the answer were denied by the reply, and upon the issues thus joined, a trial being had without a jury, the court made its findings of fact and conclusions of law, and entered judgment in favor of respondent, decreeing that he and his wife were the equitable owners of said real estate, and entitled to a conveyance thereof, and ordering said conveyance to be made. From said judgment this appeal has been taken.

The appellants Alice M. Jomsland, Orlando C. Jomsland, Ida Tibbetts, and Amanda E. Wallace, children of appellant Andrew O. Jomsland, were joined as plaintiffs in this action, they claiming that their mother, one Minnie Jomsland, wife of said Andrew O. Jomsland, died intestate in the year 1887, at which time the community consisting of said Andrew O. Jomsland and wife owned a certain homestead consisting of one hundred and sixty acres, and also a quarter section of railroad land; that after her death, there being no administration upon her estate, said real estate was held by all of said appellants as tenants in common; that the rents, issues, and profits thereof were used in the purchase of the real estate in dispute, which therefore became the common property of all of said appellants, on the theory that said Andrew O. Jomsland held the same in trust for them.

The findings of fact substantially sustain all allegations of respondent's affirmative answer. From such findings it appears that an oral contract was entered into between ap-

pellant Andrew O. Jomsland and respondent early in December, 1899, for the purchase of said land, as in the answer alleged; that shortly thereafter, to wit, in April, 1900, the respondent and his wife, in pursuance of said contract, went into possession of said land, and that said contract has been fully performed upon the part of respondent. It appears also from the evidence that, at the time of making said original contract, the respondent was not married to said Amanda E. Wallace, but that they were then about to be married, and in fact were married a very few days after the purchase of said real estate from said E. J. Dyer, trustee. It further appears that the purchase price of said land was fully paid some time during the year 1902, and that shortly thereafter said Amanda E. Wallace left her said husband, Norris Wallace, and has ever since resided with her father, separate and apart from him. The cause of this separation is not disclosed by the record.

The assignments of error presented by the appellants raise, in substance, but two questions: (1) Whether the findings of fact made by the court were sustained by the evidence; (2) whether the agreement to purchase said land in the name of appellant Andrew O. Jomsland and thereafter deed the same to respondent, being an oral contract, was within the statute of frauds. There is some considerable contention between the parties as to whether this is an action at law or in equity, said question being discussed as bearing upon the proper practice for this court to adopt in accepting or not accepting the findings of fact made by the trial court. Without discussing said question, we are satisfied, after a careful examination of all the evidence, that the findings made by the trial court are proper, being clearly sustained by the evidence; that the preponderance of said evidence is clearly with respondent, and that said findings sustain the judgment entered.

Referring to the question of the statute of frauds, it is a well established principle in equity that a verbal con-

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tract for the sale of real estate can be enforced, if part performance thereof can be clearly shown. Pomeroy, Specific Performance (2d ed.), § 96 *et seq.* There is no question but that this contract has been not only partly, but fully, performed, except that appellant Andrew O. Jomsland has not executed and delivered a deed to the respondent. It is also a well established principle in equity that possession of real estate, resulting from an oral contract for the sale thereof, with the consent of the vendor, is an act of part performance which takes the contract out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements. Pomeroy, Specific Performance (2d ed.), § 115 *et seq.*; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Menger v. Schulz*, 28 Wash. 329, 68 Pac. 875; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867. The evidence and findings here both show not only full payment and improvements, but also that, after the making of said oral agreement, respondent entered into possession of said land in pursuance thereof, and with the consent of appellants.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, and ROOT, JJ., concur.

(No. 5677. Decided August 7, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. HARVEY F.
NEWTON, *Appellant*.¹

CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT LICENSE—COMMISSION OF OFFENSE WITHIN ONE YEAR—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION—APPEAL—REVIEW—NEW TRIAL. A conviction for practicing dentistry without a license should be set aside as unwarranted by the testimony and against the overwhelming weight of the evidence, and a new trial should be ordered, where the unsupported evidence of the prosecuting witness was that it occurred at a certain office in Seattle in July, and the evidence of the defendant and

¹Reported in 81 Pac. 1002.

of numerous witnesses was to the effect that defendant was not employed in that office in July, but had removed in June to Everett, and was practicing dentistry there during July, the burden being upon the prosecution to prove the commission of the offense within one year (FULLERTON, J., dissenting).

SAME—CORRECTION OF MALPOSITION OF THE JAWS—WHAT CONSTITUTES. The taking of an impression of jaws for the purpose of making false teeth and the fitting and adjustment of the same, constitutes a "correction of malposition of the jaws," within the statute requiring a license for the practice of dentistry.

CRIMINAL LAW—APPEAL—REVIEW OF VERDICT. A verdict of guilty in a criminal case against the overwhelming weight of the evidence may be set aside on appeal where it does not subserve the ends of justice.

Appeal from a judgment of the superior court for King county, Neal, J., entered September 7, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Reversed.

John R. Parker and E. J. Brown, for appellant.

Kenneth Mackintosh and Samuel R. Stern, for respondent.

Root, J.—Appellant was prosecuted upon an information charging him with practicing dentistry, in that he did "treat a disease and lesion of the human teeth and did correct malpositions of the human teeth and jaws of one Mrs. Eliza Agutter." From a judgment of conviction, he appeals to this court.

The information was filed May 2, 1904. The evidence shows that in March, 1903, appellant was working in the dental office of one Dr. Brown. Mrs. Agutter, at that time and prior thereto, had dental work done therein, and procured a set of false teeth. As they did not fit properly, she returned to the same office some time after getting the teeth, and had another impression taken and a new set of teeth made. This work, she says, was done by appellant. She fixes the time very positively as being July, 1904. She had no natural teeth at that time. She says appellant did

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nothing at this time except to take a plaster impression of her jaws and fit the new teeth.

Appellant and six or seven witnesses testified to the effect that appellant was not connected with Dr. Brown's office during the month of July, 1904, but that he had removed to Everett in June of that year, and was engaged in a dental office in the latter city during July. Appellant testifies positively that he last saw Mrs. Agutter in March; that he did not take the impression testified to by her, nor make the second set of teeth concerning which she testified. After the testimony of appellant and his witnesses was in, Mrs. Agutter, upon rebuttal, testified that the work in question was done "after May." Appellant contends that the work he did for Mrs. Agutter was completed more than one year prior to the filing of the information, and that the prosecution is consequently barred by the statute of limitations.

This was a question of fact and, ordinarily, the verdict of the jury thereupon would be conclusive in a case of conflicting, material and competent evidence. But we cannot escape the conclusion that the facts here constitute a case coming within the exception to the rule. Mrs. Agutter, in the case in chief, fixed the time positively as being in July. She remembered it distinctly, as she says, because it was about the end of the "berrying" season. Upon rebuttal, her attention being called to the matter, she answered a leading question by saying that the time was "after May." This has the appearance of a modification of her evidence to avoid the effect of the testimony of the many witnesses who swore that appellant was not in Dr. Brown's office in July, but was in business during all of that month in Everett. The evidence of these numerous witnesses was consistent, straightforward and remained unshaken. In view of this fact, and in view of the fact that Mrs. Agutter's evidence is uncorroborated and unsatisfactory on this point, and that, having visited the office at various times prior to getting the first set of false teeth, she could readily have become

confused or mistaken as to the date or operator, we think there is strong reason to believe that she was mistaken, either as to the person or as to the time. In either event, we are satisfied that the verdict is against the overwhelming weight of the evidence, and should have been set aside by the trial court.

While courts must hesitate before disturbing verdicts based upon conflicting evidence, yet it must be remembered that the observance of this rule, like that of all others, was intended to subserve the ends of justice, and where, in a given case, it is perfectly evident that it will not so do, its binding force should not avail. The presumption of innocence follows one charged with crime until, by the evidence, he is shown guilty beyond a reasonable doubt. The burden was upon the state to show the commission of the offense charged herein, within one year prior to the filing of the information. The evidence was such upon this question that we can find nothing to justify the verdict. In such a case it is self-evident that some improper influence or motive must have actuated the jury, or that it in some manner made a prejudicial error. Where this is true, the injured party has not had a fair trial, which is the privilege and right of every suitor.

It is contended by appellant that the acts testified to did not constitute the practice of dentistry, as alleged in the information. Did the taking of the impression, the making of false teeth, and the fitting thereof in the mouth, constitute a correction of a "malposition," or of "malpositions," of the jaws? This is the question. As to whether or not making the teeth or taking the impression would, each separately or together, constitute this, we do not decide. But taken together with the actual fitting and adjustment to the jaws, we hold that it constitutes a "correction of malposition of the jaws," within the meaning of the statute.

Some errors are assigned upon the introduction of evi-

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dence. The matters complained of will probably not occur upon a new trial.

On account of the unsatisfactory character of the evidence as to the time of the occurrences testified to by the state's witness, the judgment of the honorable superior court is reversed, and the case remanded for a new trial.

MOUNT, C. J., HADLEY, RUDKIN, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—I dissent. It is a usurpation of power for this court to judge of the weight and sufficiency of the evidence on an appeal from a judgment of conviction in a criminal case.

(No. 5539. Decided August 7, 1905.)

LUCY H. A. BROWN, *Respondent*, v. EDWARD S. GILLETT,
Appellant.¹

TRIAL—VERDICT—UNCERTAINTY—INTEREST ADDED TO VERDICT. A verdict for a specified sum, "with interest," is not void for uncertainty, where the action was for money loaned at a certain date, and both the amount and date were admitted in the answer; and it was proper to add to the verdict interest at the legal rate from such date, and include it in the judgment.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 19, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Roger S. Greene and *Austin E. Griffiths*, for appellant.
Byers & Byers, for respondent.

MOUNT, C. J.—This is the second appeal in this case. When the cause was here before it was reversed and remanded for a new trial. 33 Wash. 264, 74 Pac. 386. Upon a new trial, the jury returned a verdict as follows: "We, the

¹Reported in 81 Pac. 1002.

jury in the above entitled cause, do find for the plaintiff in the sum of five hundred dollars (\$500) with interest." Upon this verdict the court entered judgment for \$500, with interest thereon from April 30, 1901, amounting to \$606.50.

The only point made upon this appeal is that the verdict is bad for uncertainty, and will not sustain the judgment. Two cases are cited from this court in support of appellant's contention, as follows: *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837, and *Western Mill & Lumber Co. v. Blanchard*, 1 Wash. 230, 23 Pac. 839. The case of *Meeker v. Gardella* was an action for damages, and no time was fixed either in the pleadings, by the facts, or by the verdict, from which interest could be computed. It was correctly held, therefore, that the verdict was bad for uncertainty, and would not support a verdict for \$600 more than was found by the jury.

The case of *Western Mill & Lumber Co. v. Blanchard* was upon a contract. The time when the payment became due was admitted to be sixty days after presentation of a draft. There was no proof that the draft was ever issued. The jury returned a verdict for a certain sum "with legal interest." No time was fixed when interest should begin. The court entered a judgment for the sum specified in the verdict, with legal interest from sixty days after a demand for payment. The only contention in that case was that the court allowed too large a sum for interest, and that contention was sustained.

The result in each of these cases was correct, but we think the facts presented there do not control the case now before us. The general rule is that, where the verdict can be made certain by reference to pleadings or the admitted facts in the case, and enough there gathered to supply any apparent uncertainty, courts are inclined to favor the validity of the verdict (*Grays Harbor Boom Co. v. Lytle Log. etc. Co.*, 38 Wash. 88, 80 Pac. 271; 29 Am. & Eng. Ency.

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Law [2d ed.], 1017); or, as stated in the last named authority, at page 1018:

“Whenever the amount for which judgment should be rendered can be determined by a simple arithmetical calculation, this may be done by the clerk at the request of the judge, or by the judge himself, and a judgment entered accordingly. Hence, though it has been held to be the exclusive province of the jury to find the exact amount of damages by their verdict, it is nevertheless true as a general rule that where the finding is for a certain date, judgment may properly be rendered for the principal sum, and the interest calculated in conformity with the terms of the verdict.”

In this case it was alleged that the respondent loaned to the appellant \$500, on April 30, 1901. Interest was demanded from that date. That allegation was admitted in the answer, so that there is no dispute in the case as to the date from which the respondent is entitled to recover interest. Neither the amount nor the date of the loan was in issue in this case, and when the jury found in favor of the plaintiff for \$500, “with interest,” there was nothing indefinite or uncertain about this finding, when read in connection with the admitted facts in the record.

The judgment of the court was right, and is therefore affirmed.

RUDKIN, ROOT, FULLERTON, and CROW, JJ., concur.

(No. 5556. Decided August 7, 1905.)

CARSTENS & EARLES, *Appellant*, v. W. V. HINE *et al.*,
Respondents.¹

APPEAL—REVIEW—HARMLESS ERROR ON TRIAL DE NOVO. In an action tried without a jury, error cannot be assigned upon the reception and exclusion of evidence, where it is not made to appear that the findings were based upon incompetent evidence or that evidence was wrongfully excluded.

SAME—TRIAL AMENDMENT—HARMLESS ERROR. Taking under advisement and failing to pass upon an application for a trial amendment to the complaint, in an action tried without a jury, is not ground for reversal when it appears from the evidence that no prejudice resulted.

APPEAL—REVIEW—FINDINGS—HARMLESS ERROR. Failure to make requested findings is not error warranting a reversal, where it appears that the result would have been the same in any event, although the party may have been entitled to have findings made upon the matter in issue.

APPEAL—REVIEW—FINDINGS—CONFLICTING EVIDENCE. Findings will not be disturbed on appeal where the evidence is conflicting and complicated and the trial court had opportunity to judge of the credibility of the witnesses, and his findings appear to be supported by an equal weight of the evidence.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered December 3, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action upon a promissory note. Affirmed.

Garrett & Grover, for appellant.

T. E. Cade, for respondents.

Root, J.—This action was brought to recover a balance alleged to be due upon a promissory note made, executed, and delivered by respondents to L. P. White & Co., and subsequently assigned to plaintiff. Prior to said assignment, \$300 had been paid on said note.

¹Reported in 81 Pac. 1004.

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Respondents were engaged in the manufacture of shingles. Appellant was a shingle broker firm. An arrangement was made by which respondents were to sell shingles through appellant, and the latter was to credit the sum of \$50 upon said note for every car-load of shingles thus sold. Respondents claim that no interest was to be charged, but in lieu thereof appellant was to have one-half of the amount allowed on account of "underweights." Appellant disputes this. There is much controversy as to the terms of the arrangement, and as to the amount of the payments made and credits allowed. The case was tried before the judge without a jury, and resulted in a judgment in favor of respondents. Appeal therefrom is taken.

Several errors are assigned as to the reception and exclusion of evidence. As there was no jury, and as it is not made to appear that the findings and judgment were based upon any incompetent or immaterial evidence, or that the evidence excluded was wrongfully rejected, to the prejudice of appellant, we cannot sustain any of these assignments of error.

During the trial, appellant asked permission to amend its complaint as to the amount credited upon the note. The trial judge took the request under advisement, and seems not to have passed upon it. In the light of the evidence, we cannot see that appellant was in any manner prejudiced thereby. Trial courts should be very liberal in allowing a party to make amendments at any stage of the proceedings, at the same time protecting the other party's rights. But this court will not reverse a case unless it appears that a refusal to grant such amendments may have injured the requesting party.

Appellant complains that the trial court did not make findings as to certain matters regarding which it requested them. Where a party in good faith requests the trial court to make findings as to certain questions involved, which he

believes to be material, it is, ordinarily, right and proper that the court should so do. If the party believes these questions material, he should have findings regarding them, so that, in case of appeal, he may bring up such matters without the trouble and expense of procuring a statement of facts or bill of exceptions. The fact that the trial judge differs from counsel as to what is material is not in itself a sufficient reason for denying the latter's request for a finding upon an issue which he deems material. In the case at bar, however, we think it appears with reasonable certainty that the result would have been the same in the trial court and here, had the findings been made as requested.

The evidence is conflicting and complicated. It would require much space to make an analysis of it. We are not satisfied that appellant's contention upon the disputed issues is supported by the preponderance, or by an equal weight, of the evidence. We are satisfied that there was sufficient evidence, if believed, to sustain the trial court's findings and judgment. The trial judge was in a better position than are we to judge of the credibility of the witnesses. In view of this and of the complicated facts and contradictory evidence, we are not disposed to disturb his findings.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, RUDKIN, and FULLERTON, JJ., concur.

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Statement of Case.

(No. 546L. Decided August 7, 1905.)

MINNIE STEVICK *et al.*, Respondents, v. NORTHERN PACIFIC
RAILWAY COMPANY, Appellant, DAVID
GREGG, Defendant.¹

MASTER AND SERVANT—NEGLIGENCE—JOINT ACTION AGAINST FOR NEGLIGENCE OF SERVANT—VERDICT EXONERATING SERVANT AND AGAINST MASTER—LEGAL EFFECT. In an action against a railroad company and its master mechanic for the wrongful death of a brakeman, a verdict in favor of the master mechanic and against the railroad company exonerates the company, precluding any recovery against it, where it is alleged in the complaint and admitted that it was the duty of the master mechanic to keep the engines in proper repair, and the only negligence alleged is that of the master mechanic in failing to repair an engine to prevent escaping steam, by reason of which the death was caused.

MASTER AND SERVANT—NEGLIGENCE—DEATH OF BRAKEMAN MAKING FLYING SWITCH—CONTRIBUTORY NEGLIGENCE—WRONG SIGNAL BY DECEASED. There can be no recovery for the death of a brakeman, on account of his contributory negligence in assisting in making a flying switch, where it appears that deceased (who was practically in charge of the operation), contrary to his duty, gave the signal to go ahead before uncoupling the car, and in reliance thereon the engineer went ahead, and the other brakeman turned the switch before the car had passed the switch, thereby derailing the car and causing the death.

SAME—FELLOW SERVANT. If such accident was caused by the negligence of the other brakeman, the result would be the same, since he was a fellow servant of the deceased.

Cross-appeals from a judgment of the superior court for King county, Griffin, J., entered June 28, 1904, upon the verdict of a jury, rendered in favor of the plaintiffs against one of the defendants, and in favor of the other defendant, after a trial on the merits, in an action for the wrongful death of a brakeman who was assisting in making a flying switch. Reversed on defendant's appeal, and action dismissed.

¹Reported in 81 Pac. 999.

B. S. Grosscup, Jas. F. McElroy, and A. G. Avery, for appellant, contended among other things, that where an injury results from a servant's performance of his duty in an improper manner, he must be held guilty of contributory negligence. *Moody v. Smith*, 64 Minn. 524, 67 N. W. 633; *Atchison etc. R. Co. v. Alsdorf*, 56 Ill. App. 578; *Browne v. New York etc. R. Co.*, 158 Mass. 247, 33 N. E. 650.

Benson & Hall, for respondents.

MOUNT, C. J.—This action was brought to recover damages on account of the death of Jesse L. Stevik, who was a brakeman in the employ of the Northern Pacific Railway Company. Stevik was killed while attempting to make what is called a "flying switch," at Argo, on October 16, 1903. The action is based on alleged negligence of the defendants. The complaint states a joint cause of action against the two defendants, alleging, in substance, that the defendant David Gregg was the master mechanic, agent, and servant of the defendant Northern Pacific Railway Company, having charge of its roundhouse and repair shops at Seattle, and charged with the duty of making all necessary repairs to engines whenever they were reported out of order; that the defendant railway company was the owner and operator of engine No. 163, which was defective in that the piston valves were in a dangerous and leaky condition and emitted large quantities of steam; that the defective condition of said engine was reported to David Gregg, several times prior to the death of Stevik; that the defendants, and both of them, negligently failed to repair said engine, or in any manner to stop the said leakage of steam therefrom; that, on the 16th day of October, 1903, while an effort was being made by said Stevik and a fellow brakeman to switch a caboose to a side-track, the said engine leaked steam so badly that a brakeman, Quinn, who was to throw the switch for the purpose of putting said caboose on the side-track, was prevented, by escaping

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steam, from seeing whether the caboose had been uncoupled from the engine; and that, believing that they were separated, he threw the switch immediately after the engine passed over the same, whereby the caboose, which had not been uncoupled, was thrown from the track and Stevik was killed.

The answer of the railway company admitted that the defendant Gregg was its master mechanic at Seattle, charged with the repair of all its engines, and denied all the allegations of negligence, but admitted that the brakeman Quinn threw the said switch while the engine and the caboose were coupled together, thereby throwing the caboose from the track and killing Stevik. It also set up affirmative defenses of contributory negligence, assumption of risk, and the negligence of a fellow servant. The answer of defendant Gregg admitted that he was the master mechanic of the defendant railway company, charged with the duty of keeping its engines in proper repair, and denied all the allegations of negligence charged in the complaint. Plaintiffs' reply denied the affirmative matter charged in the answer of the railway company.

Upon these issues, the cause came on for trial before the court and a jury. At the close of plaintiffs' evidence, the defendants each challenged the sufficiency of the evidence, and moved for a directed verdict. This motion was denied. After the evidence on behalf of the defendants had been introduced, the same motion was renewed and denied. The cause was thereupon submitted to the jury, and a verdict was rendered against the Northern Pacific Railway Company for \$3,250, and in favor of defendant Gregg. Defendant railway company thereupon moved for a dismissal of the action, upon the ground that the verdict in favor of defendant Gregg amounted in law to a discharge of defendant railway company. This motion was denied, and a judgment entered against the railway company upon the verdict. This appeal is from that judgment.

Appellant assigns error upon the refusal of the court to direct a verdict at the close of plaintiffs' evidence, because the evidence shows: (1) That the negligence of Stevick himself contributed to his death; (2) that the negligence of a fellow brakeman was the proximate cause of the injury; also that the verdict in favor of defendant Gregg was a discharge of the defendant railway company. The positions of the appellant upon the first and last grounds stated must be sustained.

It appears from the evidence that, early on the morning of October 16, 1903, engine No. 163, and a crew consisting of the engineer, fireman, conductor, and two brakemen, one of whom was Stevick, left Seattle with a caboose attached to the engine, under orders to make up a freight train at Argo, a freight yard just outside the city limits of Seattle. This crew arrived at Argo about four o'clock in the morning. It was still dark, and the weather was somewhat foggy. They proceeded to place the caboose on a side-track by means of a flying switch, while the train was to be made up on the main line. A flying switch is made by starting some distance back from the switch, and having the engine run rapidly, for a short distance, with the car intended to be switched off attached; then, slackening the speed of the engine, allowing the car to come up against the engine so that it can be uncoupled from the engine. When the coupling pin is drawn by the brakeman on the car, it is his duty to give the signal to go ahead. The engineer then quickens his speed and runs away from the car and over the switch. After the engine runs over the switch, the brakeman at the switch turns the switch, and lets the car, which comes along by its own momentum, run off onto the side-track.

On the morning of the 16th of October, as stated, the engine ran with the caboose from the roundhouse in Seattle down to the switch at Argo, and stopped. There the conductor, the fireman, and the engineer were in the cab of the engine. The brakeman Quinn took his station at the

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switch. Stevik remained upon the caboose to uncouple it from the engine at the proper time, and stop it on the side-track. The engine and caboose thereupon backed up "from fifty to one hundred yards," and again came to a stop. The engineer "whistled off," which meant that the engine and caboose were ready to start. The headlight was burning on the engine, and lights were on the rear end of the caboose on each side. Quinn could only see the headlight of the engine. He thereupon signaled to the engineer that the switch was clear, and to come ahead. The engineer then came toward the switch rapidly for a short distance, far enough to make the switch, and then slackened speed to allow Stevik to uncouple the car from the engine. Thereupon Quinn, at the switch, heard some one, whom he took to be Stevik, "holler 'All right,'" which indicated that the caboose had been uncoupled from the engine. The engine thereupon increased its speed, and, as it crossed over the switch, Quinn, without seeing the caboose, turned the switch just back of the engine. The caboose had not been uncoupled from the engine, and the switch was turned by Quinn after the front trucks had passed over, but before the rear trucks reached, the switch. The result was that the front trucks of the caboose passed down the main line and the rear trucks passed on to the switch, causing the caboose to turn over on its side. Stevik was thrown beneath it and killed.

Brakeman Quinn testified that steam was escaping from the cylinders on the left side of the engine so that he could not see the sides of the engine or the caboose, and having heard the signal which indicated that the car was uncoupled, and not being able to see it, he supposed it had been uncoupled and therefore threw the switch. There was some evidence to the effect that the engine had been leaking steam about the piston for some time prior to the accident, and that the same had been reported to the defendant Gregg. Quinn testified that the engine was leaking steam, and, by reason of that fact, he did not see that the caboose was

attached to the engine. The evidence of the witness Quinn was the only evidence offered by the plaintiffs as to how the accident occurred, and is substantially as stated above.

The only negligence alleged or attempted to be proven was that the engine was out of repair and was leaking steam, and that Gregg, the agent of the company, had notice to repair it. The defendant Gregg was joined in the action by reason of the fact that he was the master mechanic in charge of the engine, knew its condition, and, it is alleged, neglected to make the necessary repairs. The fact was admitted that the defendant Gregg was the master mechanic in charge of the engine, and that it was his duty to keep it in repair. When the jury found that defendant Gregg was not negligent, then it necessarily followed that the railway company was not negligent, because the negligence of the railway company, as stated in the complaint, is based upon the negligence of Gregg. It is true that the complaint states "that defendants, and both of them, negligently failed to repair said locomotive," but the complaint, taken as a whole, shows that the negligence of the company is based entirely upon the alleged negligence of its servant Gregg in charge of its locomotives. The jury, having found that defendant Gregg was not negligent, and having returned a verdict in his favor, necessarily exonerated the railway company. *Doremus v. Root*, 23 Wash. 719, 63 Pac. 572, 54 L. R. A. 649.

The court should have sustained the motion for a directed verdict upon the showing of the witness Quinn. The evidence shows that, after the engine had slackened its speed to permit Stevick to uncouple the caboose from the engine, Quinn, who was stationed at the switch, testified that he heard Stevick give the signal to go ahead, which indicated that the uncoupling had been made. Quinn also testified that Stevick should have given no signal until the caboose had been uncoupled from the engine. All the witnesses upon this question agree that Stevick gave the signal to go

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ahead. They differed only as to the manner in which it was given. This signal caused the engineer to go ahead. It also caused the brakeman at the switch to turn the switch after the engine had passed. Stevick was practically in charge of the switching operation. His wrong signal caused the engineer to go ahead and the switchman to throw the switch. But for this signal, the accident could not have occurred. Both the engineer and the switchman had a right to rely upon this signal, and to act upon it. *Browne v. New York etc. R. Co.*, 158 Mass. 247, 33 N. E. 650.

But if it was the duty of the brakeman who was at the switch not to turn the switch, unless he could see that the caboose was detached, and far enough behind the engine so that the switch might be turned in safety, still, the negligence of the brakeman at the switch, if he was negligent, is the negligence of a fellow servant, and the final result, upon the whole case, would be the same we have already reached.

For the reasons above given, the judgment is reversed, and the action ordered dismissed.

Root, Crow, and RUDKIN, JJ., concur.

(No. 5559. Decided August 7, 1905.)

EDWARD F. SWEENEY *et al.*, Appellants, v. FRANK
WATERHOUSE & COMPANY, Respondent.¹

CARRIERS—CONTRACT OF CARRIAGE—CONSTRUCTION—DELIVERY AT SHIP'S TACKLE—SALE IN TRANSITU WITHOUT DELIVERY. A shipping contract of a consignment of goods, to be delivered to the consignors or order "at ship's tackle," is intended to describe the place of delivery, and does not annex a condition to a contract of sale *in transitu* preventing a sale without such delivery.

SAME—FAILURE TO DELIVER—CONVERSION—ACTION BY CONSIGNORS—DEFENSES—SALE IN TRANSITU AND TRANSFER OF TITLE—RIGHT OF ASSIGNEES. An action as for a conversion, for the failure of a carrier

¹ Reported in 81 Pac. 1005.

to deliver goods shipped, cannot be maintained by the consignors of goods to be delivered at a certain port to self or order, where the consignors sold all the goods *in transitu*, and assigned and delivered the bills of lading to the purchasers, before the arrival of the vessel, who demanded and received a portion of the goods; since such sale and assignment passed the title to the goods, and rendered the carrier liable to the purchasers for failure to deliver.

SAME—TRUSTS. Such action cannot be maintained by the consignors as trustees of an express trust, since they unconditionally parted with title, especially when the suit is not prosecuted for the benefit of the purchasers.

SAME—BREACH OF CONTRACT OF CARRIAGE—ACTION FOR VALUE—DEFENSES—SALE OF GOODS BEFORE SUIT. The consignors of goods to be delivered to self or order cannot, after a sale of the goods *in transitu* and a transfer of all their title, maintain an action upon the contract of carriage for the failure of the carrier to make delivery, where the value of the goods enters into the element of the recovery, since it is essential to such action that the beneficial interest in the property remain in the consignors.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 3, 1905, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing on the merits an action for a conversion. Affirmed.

Walter S. Fulton, for appellants. The consignors' privity of contract entitled them to maintain the action, and the carrier is estopped to allege ownership in a third party. 3 Ency. Plead. & Prac., 826; Angell, Carriers, § 500; *Young v. East Alabama R. Co.*, 80 Ala. 100; *Rosenfield v. Express Co.* Fed. Cas. No. 12,060; 5 Am. & Eng. Ency. Law (2d ed.), 350; *Finn v. Western R. Corp.*, 112 Mass. 524, 17 Am. Rep. 128. An action of assumpsit lies when the shipper is bound to pay the freight. *Carter v. Graves*, 9 Yerg. (Tenn.) 446; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Stafford v. Walter*, 67 Ill. 83. In such case, the question of ownership is immaterial. *Chicago etc. R. Co. v. Shea*, 66 Ill. 471; *Cobb, Blasdel & Co. v. Illinois Cent. R. Co.*, 38 Iowa 601. The consignor is the trustee of an express trust. Bal. Code, § 4825; 3 Ency. Plead. & Prac., 828; *Hooper v. Chicago etc.*

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Citations of Counsel.

R. Co., 27 Wis. 81, 9 Am. Rep. 439; *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539. The above statute authorizes the action. *Southern Express Co. v. Craft*, 49 Miss. 480, 19 Am. Rep. 4; *Finn v. Western R. Corp.*, *supra*. The transfer of the bill of lading did not affect the contract. Bal. Code, §3590; 4 Am. & Eng. Ency. Law (2d ed.), 553. A particular kind of delivery being called for, no title passed by the assignment of the bill of lading until the delivery was made. *McNeal v. Braun*, 53 N. J. L. 617, 23 Atl. 687, 26 Am. St. 441; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190; *Taylor v. Cole*, 111 Mass. 363; *Jones & Co. v. Brewer*, 79 Ala. 545; *Perkins v. Eckert*, 55 Cal. 400; *Hooper v. Chicago etc. R. Co.*, *supra*; *Braddock Glass Co. v. Irwin*, 153 Pa. St. 440, 25 Atl. 490; *Hanauer v. Bartels*, 2 Colo. 514; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Gilman etc. v. Hill*, 36 N. H. 311; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540. Until delivery the property was at the risk of the consignor. *Dunlop v. Lambert*, 6 Clark & F. 619; *Calcutta Co. v. DeMattos*, 32 L. J. Q. B. 332. It was the duty of the carrier to make delivery as stipulated. 5 Am. & Eng. Ency. Law (2d ed.), 231, 389; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. 721, 6 Am. St. 350; *Willis v. Steamship City of Austin*, 2 Fed. 412. Even if the consignees refused to receive it. 5 Am. & Eng. Ency. Law (2d ed.), 222; *Hutchinson, Carriers*, 358; *Green etc. Nav. Co. v. Marshall*, 48 Ind. 596; *Irzo v. Perkins*, 10 Fed. 779; *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. 426; *Steamboat Keystone v. Moies*, 28 Mo. 243, 75 Am. Dec. 123. The measure of the damages is the market value of the goods. 5 Am. & Eng. Ency. Law (2d ed.), 373; *Finn v. Western R. Corp.*, *supra*. The burden was on the carrier to show that nondelivery was not due to its negligence. *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 1. Nondelivery is presumptive evidence of negligence. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. 244; *Steers v. Liverpool*

etc. Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; *Magnin v. Dinsmore*, 56 N. Y. 168; *Kirst v. Milwaukee etc. R. Co.*, 46 Wis. 489, 1 N. W. 89; 5 Am. & Eng. Ency. Law (2d ed.), 379.

W. H. Bogle, for respondent. The title passed by the assignment of the bill of lading without a delivery of the goods. Benjamin, Sales (Bennett's ed.), § 697; Newmack, Sales, § 242; 24 Am. & Eng. Ency. Law (2d ed.), 1068; *Sohlman v. Mills & Co.*, 3 Stroh. Law (S. C.) 384, 51 Am. Dec. 630; *Jones v. Davies*, 3 Houst. 68; *Pierce v. Chipman*, 8 Vt. 334; *Sigerson v. Harker*, 15 Mo. 101; *Goldstone v. Merchant's Ice & Cold Storage Co.*, 123 Cal. 625, 56 Pac. 776; *Carter v. Willard*, 19 Pick. 1; *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. 434; Bal. Code, §§ 3598-3600. At common law the suit must be brought by the person having the right of property and possession. Benjamin, Sales, § 697; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Blum v. The Caddo*, Fed. Cas. No. 1,573. Under the Code, it must be by the real party in interest. Pomeroy, Remedies, 128, 138; *First Nat. Bank v. Young*, 20 Wash. 337, 55 Pac. 215. The assignee of the shipping contract could sue in his own name. *First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965; 3 Ency. Plead. & Prac., 836; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; Hutchinson, Carriers (2d ed.), § 139; 2 Daniel, Negotiable Inst. (4th ed.), 1745a; *Merchant's Bank v. Union R. & Transp. Co.*, 69 N. Y. 373; *Robinson etc. Co. v. Memphis etc. R. Co.*, 9 Fed. 129, 141; Jones, Pledges, § 242. The bailee's duty is to deliver to the owner, on production of the shipping receipt. *First Nat. Bank v. Northern Pac. R. Co.*, *supra*; *Young v. Union Sav. Bank & Trust Co.*, 20 Wash. 360, 63 Pac. 247; *Harris v. Bradley*, Fed. Cas. No. 6,116. The right of possession was transferred with the receipt. *Goldstone v. Merchants' Ice & Cold Storage Co.*, *supra*; *Durr v. Hervey*, 44 Ark. 301. Its delivery passed title to the goods. *Carter v. Willard*, *supra*; *Lanfear v. Sumner*, 17 Mass. 110, 9 Am.

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Dec. 119. The assignor of a contract is not a trustee of an express trust. Bliss, Code Pleading, § 45; Pomeroy, Remedies, § 126. The bailee may always show that the bailor has parted with his interest in the bailment. *Nudd v. Montanye*, 38 Wis. 511; *White v. Phelps*, 14 Minn. 27, 100 Am. Dec. 190; 5 Cyc. 174; Pomeroy, Remedies, 128, 138. A carrier by water is relieved of liability for failure to deliver by waiting a reasonable time. 6 Cyc. 454, 455; *The Hattie Palmer*, 68 Fed. 380; *Clendaniel v. Tuckerman*, 17 Barb. 184.

FULLERTON, J.—The appellants, trading under the name of Arctic Trading Company, in September, 1902, shipped certain goods from Seattle, Washington, to Nome, Alaska, consigned to themselves or order, by the steamship "Garonne," then owned and operated by the respondent. The goods consisted of beer, vegetables, hay, and coal. The bill of lading specified that the goods were to be carried to "Nome anchorage," and there delivered to the appellants or order, "at ship's tackle." The harbor at Nome is an open roadstead, having no wharves or docks alongside which steamships of the size of the Garonne may land and discharge cargo, and vessels of that character are compelled to anchor from one and one-half to two miles from the shore, and discharge their cargoes on lighters. To deliver "at ship's tackle" was understood by the parties to mean a delivery over the ship's side to lighters furnished by the shipper or person authorized to receive the cargo.

The steamer arrived off Nome on October 9, 1902, and remained in the roadstead for seventeen days. During that time, she discharged all of her cargo carried under bills of lading which required delivery on shore, but delivered only about half of the goods consigned to the appellants, carrying the remainder back to the point of shipment on her return voyage. The appellants elected to treat the failure to deliver

the goods as a conversion, and brought this action to recover their value.

In answer to the complaint, the respondent interposed two principal defenses, the first being that, before the arrival of the goods at Nome, the appellants had sold the same, and were therefore not parties in interest, and could not prosecute an action to recover the value of the goods; and the second, that the failure to deliver the balance of the goods was caused in part by the bad weather and rough seas, and in part by the failure of the appellants' assignees to furnish sufficient lighterage facilities.

At the trial, it appeared from the evidence that, prior to the arrival of the goods at Nome, the appellants had sold the beer contained in the shipment to the Northwestern Commercial Company, and the balance of the goods to the North American Trading and Transportation Company, and that, on the arrival of the vessel, the agent of the appellants delivered to the respondent's agent the bill of lading for the goods and took from him two delivery orders, the one covering the beer, which he, as such agent, assigned in writing to the Northwestern Commercial Company, and the other, covering the balance of the goods, which he, in a like capacity, assigned in writing to the North American Trading and Transportation Company. Whether these sales were made upon credit or for cash does not appear from the evidence, but it does appear, that such of the goods as the respondent delivered were delivered to the holders of these assigned delivery orders. The trial court held that, inasmuch as the appellants had sold the goods *in transitu*, they had no interest in them at the time of the alleged conversion, and hence could not maintain an action to recover their value, and, without deciding the other questions presented by the record, entered judgment for the respondent.

The appellants make some contention as to the sufficiency of the evidence to justify the finding of the court to the effect that they had parted with their interest in the prop-

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erty, but we think the evidence does not leave the question in doubt. The written assignments of the delivery orders were in form absolute, and the representatives of both the appellants and the purchasers testify to a completed sale. The appellants, however, argue that because the goods were shipped to be delivered at ship's tackle, and the written assignments called for delivery at that place, there could be no sale without such delivery. But, plainly, these words were used in the bill of lading, the delivery orders, and in the written assignments, to describe the place of delivery, not to annex a condition to the contract of sale. An acceptance of a consignment of goods from Seattle to Nome would, unless it was otherwise expressly stipulated, require a common carrier to deliver the consignment at the usual landing place on the shore at Nome, and these words were evidently used in the several writings mentioned to stipulate a different place for delivering the goods than that which would be understood by an unconditional contract of carriage.

The appellants further contend that they are entitled to recover, notwithstanding they have parted with their interests in the property. In support of this contention, they argue, first, that the carrier, having received the goods from them and having failed to deliver them, is estopped to deny their title; second, that they are trustees of an express trust with relation to the property, and are entitled to maintain the action for the benefit of the *cestuis que trustent*; and third, that they have a common law action for the breach of contract of carriage.

The first contention presents a question on which there is some contrariety of decision. It was early held that a bailee must account to his bailor for the property entrusted to his care, even where it had been taken from him by legal proceedings instituted by the true owner, but the injustice of this rule was so keenly felt that it was early discarded, and now it is everywhere held that, when the true owner

has, by legal proceedings, compelled a delivery to himself of the goods bailed, such delivery is a complete justification for nondelivery according to the directions of the bailor. It is held, also, by the weight of authority, that, when the bailee has delivered the property to the true owner having a present right of possession, on his demand, such delivery is a complete defense to any action of the bailor looking to the recovery of the property or its value. And in these respects, there is no difference between a common carrier and other bailees. *Wells v. American Express Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 696; *The Idaho*, 93 U. S. 575; 6 Cyc. 471.

But in this case, the respondent did not deliver the goods sued for to any one, and the question is, can the consignors maintain an action for their value, after they have sold and assigned to a third person all their title and interest in the property. While there is, as we say, some contrariety of decision on this question, it seems to us that the better reason is that they cannot, especially under circumstances such as are shown here. The consignors not only parted with their interests in the property after making the shipment, but they assigned and delivered their evidences of title, and directed that the goods be delivered to the persons to whom they had made the assignment, and more than this, such persons demanded and received a part of the goods. The assignment of the delivery orders was, of itself, sufficient to pass title in the goods to the assignees of such orders, and gave them a right of action against the respondent for the recovery of the goods, if delivery to them should be refused on proper demand. *First Nat. Bank v. Young*, 20 Wash. 337, 55 Pac. 215; *First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965.

This being true, it is apparent that, if the appellants' contention can be maintained, the carrier can be lawfully compelled to account to more than one claimant of the property. It can be compelled to account to the consignors, be-

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cause it cannot dispute the consignors' title; and it can be compelled to account to the consignors' assignees, because they are the owners of the consigned property and are entitled to have it delivered to them. Manifestly, such a rule is unjust and ought not to be recognized, unless some principle of public policy requires it. It may be that such policy requires that a carrier should not be permitted to dispute its consignor's original title when it has not been compelled to deliver to a third person, and no demand for delivery has been made upon it by such third person, but we cannot conceive that public policy requires that the carrier should be estopped from showing, as a defense to an action for a conversion of the goods, that the consignor had parted with his title since making the consignment. Such a rule, instead of conserving a principle of public policy, would have a contrary effect; it would encourage fraud and perjury. But we do not need to go to this extent in the case before us. Here there was not only demand on the carrier by the assignees for the property, but an actual receipt by them of a part of the consignment, and so far as it appears, they are still claiming the property.

The other contentions seem to us to merit no special consideration. Since the appellants have parted unconditionally with their interests in the property, they cannot be trustees of an express trust with relation thereto. Moreover, they are suing in their own right, claiming an independent right to recover, and not for the use and benefit of their assignees.

Nor can the appellants maintain this action as for breach of contract. While at common law an action could be maintained against a carrier, either in assumpsit for a breach of the contract of carriage, or in trover or case for a conversion of the goods, yet, to maintain either of such actions where the value of the consigned goods entered into it as an element of recovery, it was essential that the beneficial interest in the property remained in the consignor. Any

act of the consignor which would defeat a recovery for the value of the goods in one form of action would defeat recovery in the other. So that, if this distinction is still available to the appellants under our system of pleading, it cannot aid them here, because the value of the goods is the sole object of recovery, and this, as we have shown, is defeated by the sale made subsequent to the consignment of the goods for shipment.

We conclude, therefore, that the appellants cannot maintain the action, and that the trial court correctly so decided. The judgment is affirmed.

MOUNT, C. J., RUDKIN, CROW, and ROOT, JJ., concur.

(No. 5627. Decided August 7, 1905.)

ANNIE L. McKNIGHT *et al.*, Respondents, v. THE CITY OF SEATTLE, Appellant.¹

JURORS—CHALLENGE—QUALIFICATIONS—FREEHOLDERS—PRESUMPTIONS. It is not error to refuse to sustain a challenge to a juror because he is not a householder, since he is competent, under Laws 1901, p. 32, if he is a freeholder, which qualification will be presumed in aid of the judgment, unless the contrary affirmatively appears.

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—DEFECT IN SIDEWALK—NOTICE—GENERAL WANT OF REPAIR. In an action for personal injuries sustained through a defective sidewalk, there was sufficient evidence of notice of the defect, where it appeared that the walk had been for a long time in a defective and dangerous condition, that the planks were decayed and liable to break, and that the city had made no effort to repair it, although it may have had no knowledge of the actual break in time to repair it.

APPEAL—REVIEW—INSTRUCTIONS—ERROR CURED. It is not error to refuse a requested instruction that is substantially given in the general charge.

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—LIABILITY FOR DEFECTS IN WALK NOT BUILT BY CITY. A city is liable for personal injuries caused by the defective condition of a sidewalk in a public street, open to the use of the public, although the walk was built by private parties.

¹Reported in 81 Pac. 998.

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Appeal from a judgment of the superior court for King county, Albertson, J., entered January 5, 1905, upon the verdict of a jury rendered in favor of the plaintiffs, for personal injuries sustained through a fall on a defective sidewalk. Affirmed.

Wm. Parmelee (Scott Calhoun, of counsel), for appellant.
P. V. Davis and Rossman & Johnson, for respondents.

FULLERTON, J.—The respondent Annie L. McKnight, while walking upon a cross-walk, on one of the public streets of the appellant city, stepped upon a defective plank therein, which gave way, throwing her down and seriously injuring her. This action was brought to recover damages for the injuries so received. The respondents were successful in the court below, and from the judgment entered in their favor the city appeals.

It is first assigned that the court erred in refusing to sustain a challenge, interposed by the city, to juror Rosenthal. This juror, while being examined touching his qualifications, in response to a question put to him by the city's attorney, stated that he was not a householder of the county of King, and was challenged for cause on that ground. In support of the contention that a person, to be qualified to sit as a juror, must be a householder, counsel cite § 2 of the act of March 19, 1895, which provides for the manner of drawing and certifying lists of grand and petit juries, in counties from the eighth to the twenty-ninth classes, inclusive. Laws 1895, p. 139. But this section was carried forward by Mr. Ballinger, and placed in his code as § 4741, and as such was amended by the act of February 18, 1901 (Laws 1901, p. 32), so as to make the phrase which formerly read "who shall be householders," read "who shall be householders or freeholders." If, therefore, it be the rule that this statute has application to the qualification of jurors in counties of the class of the county of King, a question

we do not decide, this juror was not disqualified merely because he was not a householder; as a freeholder is a qualified juror, whether he is a householder or not. It is true that the record does not show, affirmatively, that the juror was a freeholder, but this does not affect the judgment. After judgment it will be presumed that a juror had the necessary qualifications, unless the contrary affirmatively appears in the record.

The respondents alleged in their complaint that the cross-walk, on which the injury occurred, was in a "broken, decayed, and dangerous condition," and had been suffered to remain so by the city authorities, after they knew, or ought to have known, of its condition. On the trial the evidence failed to show for what length of time the break in the board had existed, and the city requested the court to charge the jury to the effect that, if they found from the evidence that the cause of the respondent's injury was the broken board, then they must find for the appellant, because there was no evidence of actual notice to the city authorities of the broken condition of the board, nor any evidence from which constructive notice on their part could be inferred. This request was refused, and error is assigned thereon.

But we think no error was committed in refusing this request. The respondents were not required to prove the case precisely as they alleged it. The gist of this part of the case was the defective condition of the walk, not the particular manner in which it was defective. If it were true that the board was not broken at all prior to the injury, but broke under the respondent's weight, as she passed over it, she could recover, under the allegations of her complaint, provided, of course, that she could show that the board was so far decayed as to be likely to break under the weight of a person, and that the city authorities had knowledge, either actual or constructive, of its condition. Here there was evidence, sufficient to go to the jury, to the effect that this walk had been for a long time in a defective and

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dangerous condition, that the planks out of which it was composed were decayed and liable to break, and that no effort was made by the city to put it in repair. If it be true, therefore, that the break in the board was the immediate cause of the injury, it is equally true that the break was the result of the general defective condition of the walk, and the city is liable, if it had knowledge of the defective condition which caused the board to break, even though it may not have known of the actual break in time to repair it.

The second instruction requested was given substantially in the general charge of the court — perhaps not in language as explicit as that contained in the request, but we think the jury must have understood it in the same manner they would have understood the requested instruction.

Lastly, it is said that the evidence was insufficient to justify the verdict. The walk was not built by the city, but by private parties, and it is claimed that there was no sufficient evidence to the effect that the city had accepted it as a part of the highway. But this street was a public street of the appellant city, opened to the use of the public, and the city was bound to keep it in a reasonably safe condition for use by the public. If this sidewalk rendered the street unsafe, it was the duty of the city to remove it or repair it, and its duty in this regard is not affected by the fact that it may not have constructed the walk. On the question whether the city had been negligent in this respect, there was evidence sufficient to go to the jury, and this court cannot, without usurping its authority, set aside their findings thereon.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, CROW, and ROOT, JJ., concur.

(No. 5543. Decided August 7, 1905.)

*In the Matter of the Estate of ELIZABETH M. DIETRICH,
Deceased.*

M. C. NASON, *Appellant*, v. ANGIE F. BROWN *et al.*,
Respondents.¹

EXECUTORS AND ADMINISTRATORS—REMOVAL—CITATION AND HEARING—WITHDRAWAL OF RESIGNATION—EFFECT ON HEARING. Where an administrator tendered his resignation with his final account, and the heirs joined issue thereon, asking the revocation of his letters for neglect of duty, he cannot evade the issue by withdrawing his resignation, and no notice or citation to him is required, upon fixing a day for the hearing.

SAME — NEGLECT OF DUTY — GROUNDS FOR REMOVAL—SUFFICIENCY. The removal of an administrator is justified where it appears that, after four months, he had filed no inventory of the estate or caused the same to be appraised, that he had given no notice to creditors, had failed to take vouchers for money paid out, and had temporarily removed from the state.

Appeal from an order of the superior court for King county, Bell, J., entered October 1, 1904, after a hearing on the merits, before the court in probate, removing an administrator, upon petition of the heirs. Affirmed.

Byers & Byers, for appellant.

Hodgson & Armstrong, for respondents.

FULLERTON, J.—Elizabeth M. Dietrich died intestate, in King county, in this state, on May 18, 1904, leaving estate therein subject to administration. Subsequently, a petition for letters of administration was filed, and on July 2, 1904, M. C. Nason, the appellant herein, was appointed by the court administrator of the estate. The appellant qualified as such administrator by taking the oath of office and filing his bond, but performed none of his other duties as administrator, except to take possession of the property

¹Reported in 81 Pac. 1061.

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and pay certain bills which he claimed were obligations of the estate. On August 30, 1904, the appellant tendered his resignation as administrator, tendering and filing at the same time his account with the estate, showing his receipts and disbursements. Shortly after the resignation and account had been filed, certain of the heirs of the deceased petitioned for the appointment of an administrator *de bonis non*, and at the same time, filed objections to the account submitted by the appellant.

At the time these matters were brought on for hearing, the appellant withdrew his resignation, whereupon the petitioners asked for his removal on the ground that he had wrongfully neglected his duties as administrator to the detriment of the estate. At the conclusion of this hearing, in which all of the parties, including the appellant, participated, the court found that the appellant had failed and neglected certain of his duties as administrator, and ordered him to appear, on a day named in the order, and show cause why his letters should not be revoked. Subsequently, this order was reduced to writing, and a copy thereof served upon the appellant and his counsel. On the day appointed, the appellant appeared specially, and moved to quash the proceedings, on the ground that the process by which it was sought to bring him into court was not in accord with the statute. This motion was overruled, whereupon he filed an answer to the merits of the charges of neglect recited in the court's order, and a hearing was had thereon, resulting in an order revoking his letters, and appointing one Charles E. Shepard administrator *de bonis non*. From this order Nason appeals.

The principal contention of the appellant is, that the court erred in refusing to quash the proceedings looking to the revocation of his letters. He insists that he was entitled to be brought into court by citation and notice, as provided for in sections 2329-2331 of Pierce's Code, and that, because no such citation or notice as therein prescribed was served upon him, the proceedings to revoke his letters should

have been quashed for want of proper notice to him. Had the petitioners commenced an independent proceeding to revoke the appellant's letters, doubtless they would have had to resort to this or some other legal method to bring the appellant before the court, but no such citation or notice was necessary in this instance, for the reason that the appellant was then before the court on this very matter. He had filed his resignation, and thereby tendered the issue whether or not his letters should be revoked, and after the issue had been joined in by the heirs of the estate, he could not withdraw from it by withdrawing his resignation. On the hearing touching the voluntary revocation of his letters, the heirs had the right to insist upon their revocation for cause.

On the merits of the controversy, it is insisted that no sufficient cause was shown to authorize a revocation of the appellant's letters. But it was shown that the appellant had been appointed administrator on May 18, 1904, and that up to the time of the hearing on the question of his resignation, which was had on September 15, 1904, he had neither filed an inventory of the property of the estate, caused the same to be appraised, or given the statutory notice to creditors; and it was made to appear, also, that he had neglected to require verified vouchers to be presented for the money of the estate his account showed he had paid out, and that he had temporarily removed from the state, and did not then have a residence therein. The facts abundantly justified his removal as administrator, and the judgment appealed from will be affirmed.

MOUNT, C. J., RUDKIN, and CROW, JJ., concur.

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(No. 5493. Decided August 7, 1905.)

W. T. CHAPMAN, *as Administrator of the Estate of Porter L. Denison, Deceased, Appellant*, v. WILLIAM F. TYSON *et al.*, *Respondents*.¹

DEEDS—TAKING TITLE IN ASSUMED NAME—VALIDITY. Where a man purchases, and takes title to, real estate in the assumed name of his son, with his own funds and for his own use, the title vests in him, and the property does not belong to the son.

SAME—CONVEYANCE BY ASSUMED NAME—FORGERY—VALIDITY OF DEED. Where a party purchased, and took title to, real estate in an assumed name, his deeds conveying the same under the same name to parties who dealt with and knew him by such assumed name, are not forgeries and are sufficient to pass title.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered September 26, 1904, upon findings in favor of the defendants, after a trial before the court without a jury, quieting their title, in an action to recover possession of real estate. Affirmed.

Barnes & Latimer, Alfred M. Craven, and W. L. Husbands, for appellant.

Hanna & Hanna and R. H. Kipp, for respondents.

CROW, J.—Action by appellant, W. T. Chapman, as administrator of the estate of Porter L. Denison, deceased, to recover possession of, and determine the title to, real estate in Whitman county. In the second amended complaint, it was alleged, that Porter L. Denison was, on May 9, 1886, seized and possessed of, and was owner of, the fee simple title to the northeast quarter of section 7, and lots 1 and 2 of section 8, in township 19, north, of range 46 E., W. M., and that on said date, he was also seized and possessed of, and was the owner of, the equitable title to the northwest quarter of section 7 in the same township and range; that

¹ Reported in 81 Pac. 1066.

said Porter L. Denison died intestate in March, 1898, being then a minor about seventeen years of age; that at the time of his death and at all times subsequent to said 6th day of May, 1886, he was the owner of, and entitled to the immediate possession of, all of said real estate; that the several respondents had wrongfully and unlawfully entered upon said land, had dispossessed said Porter L. Denison, and wrongfully withheld possession from him until the date of his death, and still wrongfully withhold said possession from appellant.

In this opinion, we will designate the northeast quarter of section 7, and lots 1 and 2, of section 8, as "tract 1," and the northwest quarter of section 7, as "tract 2." The respondents George Strange and wife, in their separate answer, claim title to, and possession of, the north sixty-six rods of said tract 1; the respondents William Tyson, Walter Tyson, and Byron Tyson, by their separate answer, claim possession of, and title to, the remaining portion of said tract, and the respondents Henry D. Kay and wife claim possession of, and title to, all of said tract 2. Many facts fully showing the entire chain of title are pleaded and disclosed by the evidence, but we will mention such facts only as are of controlling influence in settling the matters in dispute.

As to tract 1, it is conceded that, on May 9, 1886, a deed was executed for said lots 1 and 2, in section 8, by the owners of the fee simple title thereto, one James B. Tyson, now deceased, and Mary A. Tyson, his wife, to P. L. Denison; and that, on December 1, 1885, a deed was executed for the northeast quarter of section 7, by the owners of the fee simple title thereto, the Northern Pacific Railroad Company *et al.*, to Porter Leroy Denison. At the time of the execution of these deeds, Porter L. Denison was a minor about four or five years of age, residing with one Lewis H. Denison, his father. Said Lewis H. Denison, afterwards using the name of, and representing himself to

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be, Porter L. Denison, conveyed all of said tract 1 to said James B. Tyscn, from whom respondents Strange and wife deraign title to the north sixty-six rods, and respondents William, Walter, and Byron Tyson deraign title to the remainder of said tract 1.

As to tract 2, it is conceded that, on December 1, 1885, the Northern Pacific Railroad Company, being owner thereof, executed a five-year contract of sale therefor to Porter L. Denison, for \$859.05, payable \$158.70 cash, and the remainder in five annual installments. This contract was never recorded, but on January 4, 1887, was assigned to James B. Tyson by said Lewis H. Denison, who, in making such assignment, used the name of, and claimed to be, Porter L. Denison. Thereafter, on July 8, 1890, the Northern Pacific Railroad Company executed and delivered a deed for said tract 2 to said James B. Tyson, from whom the respondents Kay and wife deraign title.

The respondents separately pleaded possession and title in themselves to the various portions of said lands, as above mentioned, and alleged that all of said lands were purchased by said Lewis H. Denison in the name of Porter L. Denison; that, when he so purchased the same of said James B. Tyson and said Northern Pacific Railroad Company, he claimed his name was Porter L. Denison; that he purchased said real estate for himself; that he went into possession thereof, and at all times exercised exclusive acts of ownership over the same, until said sales were made by him; that, at the time said Northern Pacific Railroad Company and James B. Tyson sold said lands to said Lewis H. Denison, they understood and believed his name to be Porter L. Denison, and understood and believed that he was Porter L. Denison, and sold the land to the identical person so representing himself to be Porter L. Denison; that at said time Porter L. Denison, now deceased, was a minor of only about four or five years of age, incapable of contracting; that he knew

nothing of said purchases, and that the same were not made for him, in trust or otherwise.

Appellant denies all these allegations, claiming said lands were purchased for said minor, Porter L. Denison, with funds which he inherited from his deceased mother, the first wife of said Lewis H. Denison. The evidence, however, fails to show that Lewis H. Denison used any money of said minor in making said purchases. At the time of said purchases, said Lewis H. Denison was a widower, but afterwards, and before the execution of said deed for tract 1 to James B. Tyson, he married one Anna Denison, who joined him in said deed as the wife of Porter L. Denison. Said deed to tract 1 was acknowledged before one O. E. Williams, a notary public, and said assignment of said railroad contract for tract 2 was acknowledged before one Thos. R. Tannatt, a notary public; and as to each transaction, the notaries severally testified that Lewis H. Denison represented himself to be Porter L. Denison, while said Tannatt, who had previously known Lewis H. Denison, also testified that he had known him as Porter L. Denison.

The trial court made findings of fact in exact accordance with the claims of respondents, to the substantial effect that Lewis H. Denison purchased all of said lands himself, with his own funds, at the time falsely claiming his name to be Porter L. Denison; that his grantors sold to him personally, but under said name of Porter L. Denison, believing that to be his name; that he held exclusive possession of said real estate, exercising acts of ownership thereover until he sold the same; that, when he sold and conveyed tract 1 by deed, and tract 2 by assignment of the railroad contract, as above mentioned, he represented himself to his vendee, James B. Tyson, and the notaries, to be Porter L. Denison, claiming his name was Porter L. Denison; that said claim was believed and accepted by all of said parties; that the said Porter L. Denison, his son, was then only about four years of age; and knew nothing of said purchases, was

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incapable of contracting, paid nothing for said lands, and never had any legal or equitable title thereto. On these findings of fact, and others not material to mention, conclusions of law were made, and a judgment was entered quieting the title of Strange and wife to the north sixty-six rods of tract 1, the title of William, Walter, and Byron Tyson to the remainder of said tract 1, and the title of Kay and wife to all of tract 2. From the said judgment, this appeal has been taken. After a most careful examination, we are firmly convinced that all findings of fact made by the trial court are fully sustained by competent evidence, and we will not disturb the same.

Numerous assignments of error are made by appellant, but in substance they all rest upon the propositions: (1) that the ownership of, and the title, either legal or equitable, in and to, all of said land was in said minor, Porter L. Denison, from the date of said purchases until his death; (2) that the conveyances made by Lewis H. Denison were forged, and that a forged deed conveys no title whatever. As to the first proposition, we will simply suggest that, under the findings made by the trial court, which are approved by us, the facts fail to sustain appellant's contention as to the alleged ownership and title, either legal or equitable, of said decedent. When said real estate was purchased by said Lewis H. Denison, it became his property. The title did not fail to pass to him simply because he assumed the name of Porter L. Denison, or because that particular name happened to belong to his son, then four years of age, who had nothing whatever to do with the transaction.

Under the facts found and proven, we cannot arrive at the conclusion that said instruments were forged. At the time Lewis H. Denison executed them, he did not assume to act as attorney in fact or guardian for his minor son; neither did he represent that the signatures to said instruments were those of his son. The parties who dealt with

him knew he himself had made the signatures, and knew he claimed to do so in his own behalf, and not as representing his son or any other person. He executed said conveyances under a name which he had assumed when he purchased the property. James B. Tyson, his grantee, was the identical person from whom he had previously purchased lots 1 and 2, of section 8, under said assumed name. Whatever criticism may be made on the acts of said Lewis H. Denison in executing said instruments, most certainly it cannot be successfully contended that such instruments were forgeries. *The Queen v. Martin*, 5 Q. B. Div. 34; *Wiehl, Probasco & Co. v. Robertson*, 97 Tenn. 458, 37 S. W. 274, 39 L. R. A. 423.

It appears from the evidence, notwithstanding some conflict, and was found by the trial court, that in these transactions Lewis H. Denison assumed the name of Porter L. Denison, and was known as Porter L. Denison by those who dealt with him. True, he had a four-year old son bearing the same name. It is not uncommon for father and son to bear the same name, and were we to assume that all these parties with whom Lewis H. Denison dealt knew the son and also knew his name, such knowledge would amount to nothing, as it would simply be a case of father and son with the same name. When a father and son have the same name, and a conveyance of land is made without designating whether to the father or son, the law will presume that the father was intended for the grantee, in the absence of proof to the contrary. *Peabody v. Brown*, 10 Gray 45; *Stevens v. West*, 6 Jones (N. C.) 49; *Graves v. Colwell*, 90 Ill. 612; *Fyffe v. Fyffe*, 106 Ill. 646.

The parties dealing with Lewis H. Denison knew him as Porter L. Denison. Had they also known the name of his son, then only four years of age, certainly it would not have been even suspected by them that said son owned said real estate. The presumption would be one of ownership in the father, and the evidence, instead of overcoming such

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presumption, greatly strengthens it. We then have a state of facts in which Lewis H. Denison himself purchased and sold this real estate, and in so doing assumed the name of Porter L. Denison. The law is well settled to the effect that a conveyance to and by a person under an assumed name passes title. *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *David v. Williamsburgh City Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570; *Andrews v. Dyer*, 81 Maine 104, 16 Atl. 405; *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640; *Wiehl, Probasco & Co v. Robertson*, *supra*.

In *Wilson v. White*, *supra*, plaintiff had made a deed to one John Warren, whose real name was Hardwick, who paid no consideration but acted in the interest of plaintiff, assuming the name of Warren at his request and for that occasion only. Afterwards plaintiff introduced to the defendant said Hardwick, or Warren, by said name of Warren, as the man who held the title, and an arrangement was made by which Warren made a deed to defendant. It was held that the conveyance to and by Hardwick, under the assumed name of John Warren, passed title.

In *Wiehl, Probasco & Co. v. Robertson*, *supra*, Robertson, being the owner of certain real estate, executed a deed therefor to C. Phillips, a fictitious name. Afterwards he himself, assuming said name of C. Phillips, executed a trust deed to one Grayson. It was held that, although the deed from Robertson to C. Phillips was void as being made to a fictitious person, nevertheless the trust deed afterwards executed by Robertson himself under the name of C. Phillips was held valid, he still being the owner of said real estate, and having assumed said name for such purpose.

In *David v. Williamsburgh City Fire Ins. Co.*, *supra*, it appeared that certain property was conveyed by one Henry J. David, the owner thereof, by deed in form to one Marks David, a fictitious person; then afterwards, under said name

of Marks David, he conveyed the same to plaintiff. It was held that the subsequent conveyance by Henry J. David under the name of Marks David was valid and passed title, he assuming such fictitious name of Marks David for that purpose. A careful examination of these various authorities clearly sustains the position of the trial court in holding that the transfers to Lewis H. Denison under the name of Porter L. Denison, and the subsequent conveyance by him under the same name to James B. Tyson, were valid and passed title.

The judgment is affirmed.

MOUNT, C. J., and ROOT, J., concur.

RUDKIN, J. (concurring)—The mother of Porter L. Denison died before he did. Upon the death of the son, his father, Lewis H. Denison, became his sole heir at law. This action was brought to set aside conveyances made of the son's property by the father in the son's name. The father could not take advantage of his own wrong and would not be heard to question these conveyances himself. Nor should a recovery be had in the name of an administrator which will apparently inure to his benefit. It does not appear that there are any creditors of the estate of Porter L. Denison, deceased, but if there are such, and it becomes necessary to resort to this property to satisfy their claims, they should be required to proceed in such manner as will leave the conveyances intact, except in so far as they affect the rights of innocent third parties. This is a manifest attempt on the part of the father to take advantage of his own fraud and wrong, by indirection and in the name of another. I therefore concur in the judgment.

FULLERTON and HADLEY, JJ., took no part.

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Citations of Counsel.

(No. 5506. Decided August 8, 1905.)

WILLIAM JENSEN, *Respondent*, v. THE COOKS' AND WAITERS'
UNION OF SEATTLE *et al.*, *Appellants*.¹

INJUNCTION — BOYCOTT — MAINTAINING PICKETS — ACTION TO RESTRAIN — PLEADING — COMPLAINT — SUFFICIENCY. A complaint in an action to enjoin the picketing or boycott of a nonunion place of business states a cause of action, where it alleges that, upon failing to discharge a nonunion employee, the defendants, composing a union, ordered and maintained a strike against the plaintiff, and in pursuance thereof congregated about his place of business in great numbers, and maintained pickets informing his patrons that it was a scab and unfair place and attempting to dissuade persons from entering therein, etc., thereby affecting his trade; since such acts amount to an invasion of the plaintiff's lawful rights, and are properly restrained by injunction.

Appeal from a judgment of the superior court for King county, Hatch, J., entered December 21, 1904, in favor of the plaintiff, granting an injunction against picketing, as prayed for, upon overruling a demurrer to the complaint. Affirmed.

Root, Palmer & Brown, for appellants. A strike is not unlawful. *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414; *Clemitt v. Watson* (Ind.), 42 N. E. 367; *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 34 Am. St. 294, 20 L. R. A. 342; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. 648, 58 L. R. A. 135; *Union Pac. R. Co. v. Ruef*, 120 Fed. 102. What one may do lawfully alone, many may do simultaneously. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 40 Am. St. 319, 21 L. R. A. 337; *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 46 Am. St. 640, 28 L. R. A. 464; *Sinsheimer v. United Garment Workers*, 77 Hun 215, 28 N. Y. Supp. 321; *Master Build-*

¹Reported in 81 Pac. 1069.

ers' Ass'n v. Domascio, 16 Colo. App. 25, 62 Pac. 782; *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505; *Allen v. Flood*, [1898] A. C. 1, 67 L. J. Q. B. 119; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Mogul Steamship Co. v. McGregor, Gow & Co.*, L. R., 23 Q. B. Div. 598. A union may, by persuasion and entreaty, accomplish their purposes so long as no intimidation is used; the mere picketing of a neighborhood is not unlawful. *Foster v. Retail Clerks' etc. Ass'n*, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N. J. Eq. 49, 46 Atl. 208; *Krebs v. Rosenstein*, 31 Misc. Rep. 661, 66 N. Y. Supp. 42; *Levy v. Rosenstein*, 66 N. Y. Supp. 101; *Beaton v. Tarrant*, 102 Ill. App. 124; *Rogers v. Evarts*, 17 N. Y. Supp. 294. The mere fact of pecuniary loss from the concerted action of others does not give a right of action; the rule of *damnum absque injuria* applies. *Commonwealth v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen 499; *Payne v. Western R. etc. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. 755; *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 16 South. 806, 49 Am. St. 366, 27 L. R. A. 416; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136, 96 Am. St. 578; *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1, 61 Am. St. 770, 37 L. R. A. 455; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190, 39 Am. St. 686, 23 L. R. A. 135; *Cohen v. United Garment Workers*, 35 Misc. Rep. 748, 72 N. Y. Supp. 341; *Robison v. Texas Pine Land Ass'n* (Tex. Civ. App.), 40 S. W. 843; *Baker v. Sun Life Ins. Co.* (Ky.), 64 S. W. 967; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Balliet v. Cassidy*, 104 Fed. 704; and cases previously cited.

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Citations of Counsel.

Piles, Donworth, Howe & Farrell (Dallas V. Halverstadt, of counsel), for respondent. Unjustifiable action for the purpose of inflicting malicious injury is unlawful. *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 12 L. R. A. 193; *Thomas v. Cincinnati etc. R. Co.*, 62 Fed. 803; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695; *Knudsen v. Benn*, 123 Fed. 636; 1 Eddy, *Combinations*, p. 416; *Walker v. Cronin*, 107 Mass. 555; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. 330, 51 L. R. A. 339; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 83 Am. St. 289, 52 L. R. A. 115; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 74 Am. St. 421, 42 L. R. A. 407; *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737, 79 Am. St. 433, 48 L. R. A. 90; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Martin v. McFall*, 65 N. J. Eq. 91, 55 Atl. 465; *Beattie v. Callanan*, 82 App. Div. 7, 81 N. Y. Supp. 413; *Davis Mach. Co. v. Robinson*, 41 Misc. Rep. 329, 84 N. Y. Supp. 837; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327, 99 Am. St. 783, 63 L. R. A. 534; *Flaccus v. Smith*, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. 779, 54 L. R. A. 640. The complaint alleged a conspiracy. 6 Am. & Eng. Ency. Law (2d ed.), 838; 1 Eddy, *Combinations*, § 169, note 1; 4 Ency. Plead. & Prac., 707, 727, *State v. Stockford* (Conn.), 58 Atl. 769; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. 23; *State v. Donaldson*, 32 N. J. L. 141, 90 Am. Dec. 649; *Van Horn v. Van Horn*, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. 443, 35 L. R. A. 722; *Arthur v. Oakes*, 63 Fed. 310; *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588; *Thomas v. Cincinnati etc. R. Co.*, 62 Fed. 803; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428. A conspiracy to maliciously injure another's business is unlawful. *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *Old Dominion Steamship Co.*

v. McKenna, 30 Fed. 48; *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264; *United States ex rel. Guaranty Trust Co. v. Haggerty*, 116 Fed. 510; 1 *Eddy, Combinations*, §§ 479, 480; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. 203, 43 L. R. A. 797; *Lucke v. Clothing Cutters' etc. Assembly*, 77 Md. 396, 26 Atl. 505, 39 Am. St. 421, 19 L. R. A. 408; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *State ex rel. Durner v. Huegen*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; and cases previously cited. The respective acts enjoined became illegal by reason of their being part of an unlawful conspiracy. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276; *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3.

PER CURIAM.—This is a suit brought by the respondent against the Cooks' and Waiters' Union of Seattle, and certain individual defendants, to enjoin them from unlawfully interfering with and injuring the respondent's business. A general demurrer was interposed to the complaint, which the trial court overruled, whereupon the defendants refused to plead further, and judgment was entered against them according to the prayer of the complaint. The ultimate question on this appeal therefore is, does the complaint state facts sufficient to constitute a cause of action?

The respondent in his complaint alleges that he is a resident and citizen of the city of Seattle, and was, at that time, and for three years last past had been, the proprietor of, and running, in the city, that certain cafe known as the "Bismarck"; that, prior to the interference therein of the defendants, the cafe had been doing a very large business; it affording a seating capacity for 550 people, and was patronized daily by from 2,000 to 3,000 persons; that he had in his employ, as floor manager for his cafe, one Kuehl, who was a competent man for such position, and whose work therein was satisfactory to the respondent, and that said Kuehl was not a member of the appellant Union; that,

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shortly prior to November 13, 1904, certain employees of respondent, who were members of the appellant Union, and the appellant Union, acting by its members and by the defendants Smith, Reef and Hasketh, demanded of respondent that he discharge from his employ said Kuehl, because said Kuehl was not a member of the appellant Union; that the respondent refused to comply with this demand, whereupon said persons requested the respondent to inform them whether he would allow them to endeavor to induce said Kuehl to join the appellant Union, to which request the respondent replied that he had nothing to do with the actions of said Kuehl in that regard; that, on November 13, 1904, said appellant Union, acting by said Smith, Reef, and Hasketh, and other members of said Union, demanded of Kuehl that he join the appellant Union, to which demand the said Kuehl refused to comply, and that thereupon the said Union ordered a strike among respondent's employees, and that said employees who were members of said Union, namely his cooks and waiters, walked out just at the dinner hour of said cafe, and that said strike had since been continued by the said Union, under the direction and with the cooperation of said Smith, Reef, and Hasketh; that, since the inauguration of said strike, the said Smith, Reef, Hasketh and their associates, under the name of the appellant Union, had maintained pickets in and about the entrance to said cafe, who interfered with the patrons of said cafe, and informed said patrons that the said cafe was a scab place, that it was an unfair place, and that it should not be patronized by the public, and that said pickets congregated around the entrance to said cafe, especially at meal hours, and attempted to dissuade persons from entering the cafe; that they abused the respondent as maintaining an unfair and scab place of business; that they endeavored to persuade the public generally, and the patrons of said cafe especially, to boycott said cafe until the respondent should comply with the demand of the appellant Union; that the action of the

appellant Union and its codefendants was joint and concerted, and was had pursuant to an agreement made between them prior to the inauguration of said strike, with the malicious intention of injuring the respondent's business; that they had threatened to drive respondent out of business, and were endeavoring to carry out their threats by diverting the patronage which, prior to said strike, had been going to respondent's cafe; that respondent had, by care and attention, built up a large business, but that the appellant and its codefendants had, by their wrongful acts and conduct, diverted a large part of his business, reducing his daily receipts by large sums, averaging from \$100 to \$150 per day; that if said picketing was allowed to continue, the respondent would be irreparably injured in the conduct of his business and would be without remedy therefor, because said appellant Union, and its codefendants, were wholly irresponsible and insolvent and unable to respond in damages. The prayer was for an injunction enjoining the defendants from the commission of these acts.

In discussing the questions suggested by the record, the arguments of counsel have taken a wide range, and elaborate briefs have been filed, in which numerous authorities are collated. The vital question at issue, however, it seems to us, is a simple one and easy of solution. Clearly, the acts of the appellants and defendants, as set forth in the complaint, are illegal and may be restrained by an injunction. It is true that a man, not under contract obligations to the contrary, has the right to quit the service of another at any time he sees fit, and may lawfully state, either publicly or privately, the grievances felt by him which gave rise to his conduct. And that right which one man may exercise singly, many may lawfully agree, by voluntary association, to exercise jointly. But one man singly, nor any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to

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deal with him. Men cannot lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a natural right, the right to own, and peaceably enjoy, property. The acts of the defendants, as set forth in the complaint, amounted to an invasion of the respondent's lawful rights, and they were properly enjoined by the trial court.

The judgment appealed from is affirmed.

Root, J., having been of counsel, took no part.

(No. 4952. Decided August 8, 1905.)

WILLIAM O'BRIEN, *Appellant*, v. PAGE LUMBER COMPANY,
Respondent.¹

MASTER AND SERVANT—NEGLIGENCE—EMPLOYMENT OF INCOMPETENT FELLOW SERVANTS—NOTICE OF INCOMPETENCY. There is no evidence upon which to submit to the jury an issue as to the negligence of the owner of a mill in employing an incompetent sawyer, where it appears that he was competent at the time he was employed; and that the employer had no knowledge of his becoming incompetent by reason of the use of intoxicating liquors, as alleged.

SAME—VICE PRINCIPAL AND FELLOW SERVANTS—SAWYER IN CONTROL OF ONE OF HIS CREW—SAFE PLACE—DUTY TO WARN OF AGENCY RENDERING PLACE UNSAFE. A sawyer in control of a saw crew, while a fellow servant with the members of the crew in respect to their labor in working together in the common employment of converting logs into lumber, is nevertheless a vice principal as to the duty to give warning of his operation of the machinery, where it appears that the men were bound to obey his orders, that he ordered the plaintiff, a dogger, to remove a log from the head-block where it had been lodged by the operation of the nigger, a powerful machine under his control, and that, while the dogger was so engaged, with his back to the sawyer, the sawyer, without warning, operated the machinery

¹Reported in 82 Pac. 114.

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39	537
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and applied the nigger to the log at a time when it was evident that the plaintiff's position would thereby be rendered extremely dangerous, and from which injury to him resulted; since after ordering the servant into a dangerous position, it was the duty of the master to keep the place safe and to warn the servant of the use of an agency by the master which would render such place unsafe; the sawyer's negligence in respect to such warning being the act of a vice principal, the peril of which was known to him as such, and unknown to the servant, and being the negligence that rendered the place unsafe.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 1, 1903, upon the verdict of a jury rendered in favor of the defendant by direction of the court, after a trial on the merits, dismissing an action for personal injuries sustained by one employed as a "dogger" on a saw carriage in defendant's mill. Reversed.

George W. Saulsberry and Charles Bedford, for appellant. The sawyer was a vice principal by reason of his power of superintendence and control. *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Hammarberg v. St. Paul etc. Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *Hunt v. Desloge Consol. Lead Co.*, 104 Mo. App. 377, 79 S. W. 710; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *Evans v. Louisiana Lumber Co.*, 111 La. 534, 35 South. 736; *Illinois Southern R. Co. v. Marshall*, 210 Ill. 562, 71 N. E. 597. Also, because it was one of the duties of the master to maintain the safety of the place. *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227, 68 Pac. 721. Also, because the giving of orders with respect to work by subordinates was one of the master's duties. *Labatt, Master & Servant*, § 541; *Coffeyville Vitrified Brick & Tile Co. v. Shanks*, 69 Kan. 306, 76 Pac. 856; *Dixon v.*

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Citations of Counsel.

Union Iron Works, 90 Minn. 492, 97 N. W. 375; *Bering Mfg. Co. v. Femelat* (Tex. Civ. App.), 79 S. W. 869; *Illinois Southern R. Co. v. Marshall*, 210 Ill. 562, 71 N. E. 597; *Seymour Woolen Factory Co. v. Brodhecker*, 130 Ind. 389, 28 N. E. 185, 30 N. E. 528. Also, because the element of consociation was lacking. *Jancko v. West Coast Mfg. Co.*, 34 Wash. 556, 76 Pac. 78; *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *North Chicago Rolling-Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186. Where a servant is placed in a perilous situation by the orders of a superior workman, an act of the superior rendering the place unsafe, without giving a warning or opportunity to the inferior to escape, is the act of a vice principal. *Taylor v. Evansville etc. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. 372, 6 L. R. A. 584; *Crystal Ice Co. v. Sherlock*, 37 Neb. 19, 55 N. W. 294; *Hannibal etc. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320; *Chicago etc. R. Co. v. O'Brien*, 154 Ill. 630, 40 N. E. 1023; *Chicago etc. R. Co. v. Lundstrom*, 16 Neb. 254, 20 N. W. 198, 49 Am. Rep. 718; *Russ v. Wabash West. R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; *Hough v. Texas etc. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182; *Nall v. Louisville etc. R. Co.*, 129 Ind. 260, 28 N. E. 183, 611; *Cheeney v. Ocean Steamship Co.*, 92 Ga. 726, 19 S. E. 33, 44 Am. St. 113; *Richmond etc. R. Co. v. Williams*, 86 Va. 165, 9 S. E. 990, 19 Am. St. 876; *Luebke v. Chicago etc. R. Co.*, 59 Wis. 127, 17 N. W. 870, 48 Am. Rep. 483; *Louisville etc. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Louisville etc. R. Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187, 31 Am. St. 443; *Klochinski v. Shores Lumber Co.*, 93 Wis. 417, 67 N. W. 934.

Hudson & Holt, for respondent. The two men were fellow servants of a common master, engaged in and about a common work. *Hawk v. McCloud Lumber Co.*, 166 Mo. 121, 65 S. W. 1022; *Millet v. Puget Sound Iron & Steel Works*, 37

Wash. 438, 79 Pac. 980. A fellow workman is a vice principal only in the performance of the master's duties. *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Zintek v. Stimson Mill Co.*, 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055; *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244. The application of the nigger was an act of operation involved in the common labor, the dangers from which were assumed risks. *Watts v. Hart*, *supra*; *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Loranger v. Lake Shore etc. R. Co.*, 104 Mich. 80, 62 N. W. 137; *Melville v. Missouri River etc. Co.*, 48 Fed. 820; *Taylor v. Evansville etc. R. Co.*, 121 Ind. 124, 22 N. E. 876, 16 Am. St. 372, 6 L. R. A. 584; *Riley v. West Virginia Cent. R. Co.*, 27 W. Va. 145; *Bailey*, Personal Injuries, § 2993. It is not the duty of the master to warn of the negligence of a fellow servant in such act of operation. *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; *Alaska Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *McGowan v. Chicago etc. R. Co.*, 91 Wis. 147, 64 N. W. 891; *Anderson v. Oregon R. & Nav. Co.*, 28 Wash. 467, 68 Pac. 863. It is not his duty to warn of transient dangers arising during the progress of the work. 2 Labatt, Master & Servant, §§ 580, 586-588, 590; *Id.*, p. 1760, note j; *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785; *Tierney v. Minneapolis etc. R. Co.*, 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853; *Baird v. Reilly*, 92 Fed. 884; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. The danger to which the plaintiff was exposed was such a transitory danger. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 52 N. E. 518; *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; 2 Labatt, Master & Servant, §§ 586, 587, and cases cited on pp. 1722, 1723. Whether the negligence was in the performance of

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one of the duties owed by the master does not depend upon the control that one servant has over another. 2 Labatt, Master & Servant, §§ 515, 516, 519; Wood, Master & Servant, §§ 844, 874-885; *Stevens v. Chamberlin*, 100 Fed. 378; *Lepan v. Hall*, 128 Mich. 523, 87 N. W. 619. Signalling by one servant is not an exercise of control. 2 Labatt, Master & Servant, §§ 522, 523; *Pittsburg etc. R. Co. v. Ranney*, 37 Ohio St. 665. The master is not bound to supervise the details of the work. 2 Labatt, Master & Servant, §§ 586-591, 597; Wood, Master & Servant, 844, 874-891; *Hussey v. Coger*, 112 N. Y. 614, 20 N. E. 566, 8 Am. St. 787, 3 L. R. A. 599; *Besel v. New York etc. Co.*, 70 N. Y. 171; *Wooden v. Western New York etc. R. Co.*, 147 N. Y. 508, 42 N. E. 199. Nor to see at all times during the progress of the work that the place remains safe. *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; 1 Labatt, Master & Servant, § 14; *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162, 33 Atl. 1102; *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 563, 64 N. W. 335, 66 N. W. 951, 58 Am. St. 505, 32 L. R. A. 435; 2 Labatt, Master & Servant, §§ 588, 590; *St. Louis etc. R. Co. v. Needham*, 63 Fed. 107, 25 L. R. A. 833; *Anderson v. Oregon R. & Nav. Co.*, 28 Wash. 467, 68 Pac. 863; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713.

MOUNT, C. J.—This appeal is from a judgment in favor of defendant, rendered upon motion for a directed verdict at the close of plaintiff's evidence. Plaintiff appeals.

The material facts, as shown by the pleadings and plaintiff's evidence, are briefly as follows: In the year 1902, the respondent owned and operated a sawmill at Buckley, in Pierce county, Washington, for manufacturing lumber. The appellant, William O'Brien, was employed in the mill as a "dogger." This employment required the appellant to ride backwards and forwards on the saw carriage, and to attach the "dogs" to the log on the carriage. These dogs were devices for holding the logs securely in position

to saw. It was also the duty of the dogger to detach the dogs, at the direction of the sawyer, when the log was to be turned upon the carriage, and to perform such other duties as were required of him by the sawyer. The saw crew consisted of the sawyer, one tail sawyer, two doggers, and one setter. All of these men were under the supervision and control of the sawyer, and were bound to obey his orders. They took their orders from him and no one else. If they failed to obey him, they were discharged upon his recommendation to the superintendent.

Over the sawyer, there was a superintendent, who had general control over the whole mill, and who employed and discharged the men. The appellant was an experienced dogger and thoroughly familiar with the work. Near each end of the saw carriage, was a "head-block" about two feet in height, against which the ends of the logs were securely held by the dogs. Stationary in the floor of the mill, along the line of the carriage way, was a device called a "nigger," which consisted of a piece of timber with iron spikes along the upper side. This "nigger" was a powerful machine, used in striking and pushing heavy logs on to the carriage, and for turning them thereon when desired. It was operated by steam power by the sawyer, by means of a lever, and in no other way. There was also a chain device overhead, operated by steam power, for rolling logs on the carriage and for turning them while on the saw carriage. The saw carriage was operated back and forth by steam power, by means of a lever in the hands of the sawyer.

On the 31st day of July, 1902, a log thirty-two inches in diameter and twenty-four feet long was placed upon the saw carriage to be cut into lumber. After the log had been cut upon three sides, the sawyer desired it to be turned over on the carriage, so as to be cut upon the other side. He moved the saw carriage back for the purpose of using the nigger to turn the log. The dogs were released and the force of the nigger was applied to the log. The carriage

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had not been moved back far enough for the stationary nigger to strike the log in the center. It struck nearer the end at which appellant was working. Instead of turning the log over upon the carriage, the nigger lifted the end of the log near appellant and placed it upon the head-block where it rested. The sawyer thereupon directed appellant to remove the end of the log from the head-block back on to the carriage. Appellant, in obedience to the order, procured a peavy or canthook, and was attempting to pry the end of the log back on to the saw carriage. He was standing with his back toward the sawyer in plain view of the sawyer, who, without warning to appellant, again applied the nigger to the log as it lay upon the head-block. The force of the blow of the nigger knocked the end of the log over the head-block, and the weight of the log caused the appellant to drop his peavy. The other end of the log, toward the sawyer, slid in the opposite direction, and struck and broke the lever, which started the saw carriage forward at full speed, with the log crosswise and raking the sides of the mill. Appellant, in order to escape the log, attempted to get through a door on the side of the mill. As he did so, the log caught his left hand, injuring it so that the amputation of three fingers was necessary.

There are two charges of negligence in the complaint: (1) that the sawyer was negligent and careless in applying the nigger to the log, without warning, while appellant was trying to pry the log off the head-block; (2) that the company was negligent in employing an incompetent and reckless sawyer, who was addicted to the use of alcoholic liquor. It is contended, on this appeal, that the evidence was sufficient to go to the jury upon both questions. We are satisfied, however, that there was no evidence upon the second question to be submitted to the jury. The evidence for the plaintiff showed that the sawyer was a competent man for the work when he was employed. If he became

incompetent, by reason of the use of intoxicating liquors or otherwise, there is no evidence that the respondent had any knowledge of the fact, or reasonably should have known it.

The other question is more difficult, and is the principal question relied upon by appellant, and is exhaustively argued by both parties. Appellant contends that the sawyer, under the circumstances shown by the evidence, was a vice principal, and that he owed a duty to appellant to warn him of an intention to apply the nigger to the log, while appellant was working with his back to the sawyer, and in no position to see what was going on. Respondent, on the other hand, contends, that the sawyer and the appellant were fellow servants, engaged in a common employment, viz., cutting logs into lumber, each having his special duties to perform, and each working in sight of the other; that the lifting of the end of the log from the head-block to the carriage was a mere detail of the work; that when the sawyer undertook to strike the log with the nigger, and thus assist the appellant to place the log properly upon the carriage, if the sawyer was negligent, either in the use of the nigger or in failing to warn the appellant of danger, such negligence was the negligence of a fellow servant, for which the master would not be liable.

It will thus be seen that the question presented is, whether the sawyer was a vice principal, or was a fellow servant with the appellant, in respect of the warning. This question is argued with learning and ability on both sides, and many authorities are called to our attention in support of the respective positions. In some respects, the sawyer was a fellow servant with the appellant. It required the labor of both to place the logs upon the saw carriage. The appellant attached the log firmly to the carriage so that it might be passed through the saw by the sawyer. The appellant loosened the logs from the carriage so that the sawyer might turn them at the proper time. In these respects,

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they were fellow servants, working together, each having his particular duties in the common employment of converting logs into lumber.

In some respects, the sawyer was a vice principal. He was the superior in control of the saw crew, consisting of the doggers, the setter, and the tail sawyer. These men were bound to obey his commands. He directed their work when directions were necessary. They took their orders from him and "no one else." If they failed to obey him, they were discharged upon his recommendation to the superintendent. It is true, there is no evidence that the sawyer had power to hire men or to discharge them except as above stated; but we held, in *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244, that "the power of superintendence and control is the test" in such cases. Under this rule, the sawyer stood in the place of the master, for the purpose of directing the work of the saw crew, and was therefore a vice principal to that extent. We are also of the opinion, that the sawyer was a vice principal in respect to the safety of the place and the appliances.

"It is the master's duty to provide a safe place for his employee to do his work, and to see that it is kept in a suitably safe condition, and this duty he cannot delegate to another so as to relieve himself from liability." *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334, and cases cited.

There appears to be no contention in this case that the appliances were not in good order, or that the place was not as safe, under ordinary circumstances, as the character of the work would permit. These facts are therefore conceded. As to the details of the work in which the sawyer and appellant were fellow servants, the master was not liable; but when the log was placed by accident in an extraordinary position upon the head-block, the direction of the sawyer to appellant to remove the log was a command

by the master to the servant which he was bound to obey. It was the duty of the master, then, to keep the place into which he had sent the servant reasonably safe, or to inform the servant of dangers known to the master, or which reasonably should have been known to him, and which were unknown to the servant. If the sawyer, acting in the place of the master, intended to direct another agency under his control to act in conjunction with the appellant, which agency rendered the place dangerous, it was certainly the duty of the master to inform the servant thereof. Especially, where the servant was in such a position that he could not observe the agency, or the fact that it was about to be put into action.

Respondent contends that the act of the sawyer in using the nigger the second time was a detail of the work, and in that respect he was acting as a fellow servant. This contention is probably correct, so far as the mere fact of using the nigger was concerned. But in view of the fact that, when the nigger was used the first time, it threw the log upon the head-block, it was apparent to every one that another blow by the nigger, while the log was in that position, would send it further over and make the position of the appellant an extremely dangerous one and, therefore, it was the duty of the master to see and know of the danger, and not to direct the nigger into action without notice to the appellant. In other words, the sawyer, as master, knew that he was about to direct the nigger into action. He knew, or should have known, of the peril in which he was about to place the appellant. The appellant did not know what the master had ordered. He could neither see nor hear him. The sawyer, then, as servant, performed the detail of the work as directed by him as master. The negligence which made the place a dangerous one was the failure of the sawyer as master to warn the appellant of the danger in which he was about to place the servant. This view of the case, which we think is the logi-

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cal and correct one, brings this case squarely within the rule announced in *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 543, 67 Pac. 237, and cases there cited, where we held, in substance, that when the performance of an act will place a servant in a dangerous place which is known, or should be known, to be such, and where such act is performed by a fellow servant at the command of the vice principal, it is the duty of the master to warn the servant in such dangerous place, and a failure to give such warning is negligence of the master. This case cannot reasonably be distinguished in principle from the *Nelson* case, and is controlled by it.

Counsel for respondent argues that the principles which were applied to the case of *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830, and cases which subsequently approved that case, are applicable to this case upon the question as to whether the sawyer and the dogger were fellow servants. But from what we have said above, indicating that the sawyer was a vice principal as to the duty to warn the appellant of the danger of the place, his negligence in this respect was the neglect of the master, and distinguishes *Sayward v. Carlson* from this case. There being sufficient evidence to go to the jury upon this point, the lower court erred in directing a verdict for defendant.

The judgment appealed from is therefore reversed, and the cause remanded for further proceedings.

HADLEY, FULLERTON, and CROW, JJ., concur.

(No. 5593. Decided August 9, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. R. H. OSBORNE,
Appellant.¹

CRIMINAL LAW—INFORMATION—CERTAINTY—DATE OF OFFENSE—VARIANCE—RAPE. Under an information charging the commission of rape on a certain day, it is not a variance to prove that it occurred on a Sunday, one or two weeks prior thereto, the allegation as to time being immaterial except to fix a date within the period of the limitation of the statute; and such an information is not uncertain as to the crime charged.

SAME—UNCERTAINTY AS TO DATE—SEVERAL OFFENSES—ELECTION. Under an information charging the commission of a rape on a certain day, no prejudice results from the fact that the evidence of the prosecuting witness showed a series of acts prior to the day named, each constituting the offense, but none on that day, when the prosecuting attorney was required to make an election as to which of the acts he would rely upon for a conviction, and the jury were instructed to acquit unless the accused was found to be guilty of such act.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 28, 1904, upon a trial and conviction of the crime of rape. Affirmed.

Oscar Cain, for appellant.

Lester S. Wilson, for respondent.

FULLERTON, J.—On October 11, 1904, the appellant was informed against for the crime of rape, alleged to have been committed on October 10, 1904, on the person of a female child of the age of thirteen years. On arraignment he pleaded not guilty, and, in the due course of procedure, was put upon his trial.

The evidence on the part of the state tended to show that the appellant commenced criminal relations with the girl some three months prior to the time the information was filed against him, and that these were continued down

¹Reported in 81 Pac. 1096.

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to the time of his arrest. The evidence of the specific acts rested on the testimony of the girl herself, and she could not fix, definitely, the dates of their occurrences, but she testified to several attempts, made at the beginning of their relationship, from four days to two weeks apart, resulting finally in consummated acts of sexual intercourse, occurring at like periods, the last of which occurred on a Sunday, a week or two weeks prior to the date laid in the information. The first of these acts took place in the back part of the store of the appellant, in the city of Walla Walla, and the later ones, near the suburbs of that city, at a place known as McGallon's grove. The witness testified that no consummated act of sexual intercourse took place between them, at the time named in the information, namely, October 10, 1904. She testified that she had met the appellant at the grove for that purpose on that day, and that they were about to consummate the act, when they were interrupted by a person who immediately caused the arrest of the appellant, and her own detention.

On the trial, when these facts appeared, the appellant moved that the jury be instructed to return a verdict of not guilty, stating as grounds for the motion, "that the evidence in this case shows that, upon the day charged in the information, the defendant did not commit the crime of rape, and that the acts proved there do not constitute attempted rape." The court declined to direct a verdict as requested, but, on its own motion, directed the prosecution to elect upon which of the several acts the evidence tended to prove, he would rely for a conviction. The prosecuting attorney thereupon elected to rely upon an act testified to by the girl as occurring on a Sunday, at McGallon's grove, the week before, or two weeks before, the time laid in the information.

The appellant thereupon put in his defense, and the cause was submitted to the jury, under instructions from the court to find the appellant not guilty, unless the evidence satisfied

their minds, beyond a reasonable doubt, that the appellant had carnal knowledge of the prosecuting witness at the time testified to by her on Sunday, at McGallon's grove, one or two weeks prior to the time laid in the information. A verdict of guilty was returned by the jury, and sentence pronounced thereon. The appellant excepted to the ruling of the court refusing to direct a verdict in his favor, and assigns such refusal as error on this appeal.

The appellant contends that the information charges a rape committed on October 10, 1904, and that, when the state failed to prove a rape committed on that day, it failed in its proofs, and the appellant was entitled to an instruction directing a verdict of not guilty. He argues that, under the statute, as well as under the general principles of criminal law, the information must be direct and certain as to the crime charged, and the particular circumstances of the crime charged, and that, unless the date on which the offense is alleged to have been committed is held to be a material allegation, the information is not direct and certain in these respects, and the result is that the state is left to prove a series of acts, and, after its evidence is all in, select therefrom that one on which it deems its proof the strongest, or the defendant the least prepared to defend against; and he presents some supposed cases as examples where serious miscarriages of justice might result from such a practice.

But aside from the fact that the dangers to innocent defendants, from the practice followed by the court in this instance, are more fanciful than real, inasmuch as it is always in the power of the court to protect the defendant from surprises, or against everything looking towards sharp practice on the part of the officer of the state, we think the statute authorizes the practice. It is expressly provided therein that the precise time at which the crime was committed need not be stated in the indictment or information, but a general allegation that it was committed before the finding of the indictment, or the filing of the informa-

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tion, and within the time in which an action may be commenced therefor, is sufficient. Bal. Code, § 6845. In construing this section of the statute, this court has heretofore given it this meaning. In *State v. Wilson*, 9 Wash. 16, 36 Pac. 967, we held that an instruction in a case where the defendant was being tried for conducting a gambling game, to the effect that it was not necessary that the jury should find that the offense was committed on the day named in the information, but that it was sufficient if they found that it was committed on a day certain, within one year next preceding the filing of the information, correctly stated the law of the case. And, in *State v. Anderson*, 30 Wash. 14, 70 Pac. 104, we held that it was not a variance, under an allegation that the assault and death occurred on the 12th day of May, 1901, to prove that the assault occurred on the 11th, and the death on the 14th, of the same month.

This statute and these cases lay down the rule that the allegation of time, in an indictment or information, is immaterial other than it must be shown on the face of the one or the other, as the case may be, that the right to prosecute for the crime charged is not barred by the statute of limitations. Hence it is clear that the information filed in this case was sufficient, in form and substance, to admit proofs of, and sustain a conviction for, a rape committed by the appellant upon the prosecuting witness at any time within three years next preceding its filing. It is clear also that, were there no evidence of rape other than that of the time on which the prosecuting attorney elected to rely, there could be no question as to the sufficiency of the evidence to sustain a conviction.

If, then, the information or the evidence has been rendered insufficient to sustain a conviction, entitling the appellant to an instructed verdict in his favor, it is because other acts of rape, committed by him upon the prosecuting witness within the period of time covered by the information, have

been shown. But can this evidence have such an effect? We think it cannot. Proof that a defendant has committed two or more similar crimes, to which an information filed against him might relate, cannot render an information, otherwise sufficient, insufficient to maintain a conviction of any one of such crimes. Nor can proofs that two distinct crimes have been committed render the proofs insufficient to sustain a conviction for either of such crimes. The only effect such proofs can have is to render it uncertain as to which of the several crimes proven the information was intended to relate, and, when this is ascertained, the information and proofs become as certain as they do where evidence of only one crime is offered. The proper way to make this ascertainment is to require the prosecution to elect. Such was the procedure in the case at bar, and we hold it regular.

We note the contention of the appellant that the conviction in this case cannot be sustained unless the court overrules the case of *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810, but this contention is so apparently unfounded as not to merit serious reply.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, CROW, and ROOT, JJ., concur.

(No. 5526. Decided August 9, 1905.)

L. H. HUGGINS, *Respondent*, v. W. E. SUTHERLAND,
Respondent, L. M. PHILPOTT *et al.*, *Appellants*.¹

ACTIONS — MISJOINDER — PRINCIPAL AND SURETIES — JUDGMENT IN DIFFERENT SUMS — APPEAL — REVIEW — HARMLESS ERROR. Upon appeal from a judgment against the principal and sureties on a bond, a misjoinder of causes of action cannot be asserted from the fact that judgment was rendered in different sums against the principal and the sureties, where the record of the trial is not brought up and the defect does not appear on the face of the complaint, and where the error appears to be in favor of appellants.

¹Reported in 82 Pac. 112.

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INDEMNITY—BONDS—OF CONTRACTOR ON PUBLIC WORK—DEFENSES—RUNNING TO CITY—MISTAKE OF OBLIGORS. The principal and sureties upon a contractor's statutory bond given to a city to protect laborers and materialmen upon a public work, cannot take advantage of a mistake whereby the bond runs to the city, instead of to the state as required by statute.

SAME—ACTION BY MATERIALMEN—FILING CLAIMS WITH CITY—RELEASE OF SURETIES. Materialmen who furnished material to a contractor upon municipal work cannot maintain an action against the sureties upon the contractor's statutory bond, unless, within thirty days after the completion of the contract, they filed their claims with the city council, as required by Laws 1899, p. 172; such notice being for the benefit of the sureties, and failure to give the same operating to discharge them.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered April 6, 1904, in favor of the plaintiff, upon the default of the defendants to appear at the trial, in an action upon a contractor's statutory bond. Reversed.

Zent, Lovell & Linn, for appellants.

MOUNT, C. J.—This action was brought upon a contractor's bond for the construction of public improvements for the town of Lind, a municipal corporation. From a judgment in favor of plaintiff, the defendants who were sureties upon the bond have appealed.

The complaint alleges two causes of action. The first is as follows:

“(1) That on the 29th day of May, 1902, defendant W. E. Sutherland made and entered into a certain contract, in writing, with the town of Lind, a municipal corporation, for the furnishing of the material and the construction of a bridge on Van Marter avenue, in the town of Lind, across the stream of the Lind Coulee, and it was then and there agreed between the said town of Lind and W. E. Sutherland that the said W. E. Sutherland should furnish all labor and materials entering into the construction of and completion of said bridge, for the sum of \$800, which the said town of Lind then and there agreed to pay.

“(2) That on the said 29th day of May, 1902, the said W. E. Sutherland, for the security of the said town of Lind,

and to protect it against liens for material and otherwise, and in accordance with the contract hereinbefore alleged, and in pursuance with the statutes of Washington, in such cases made and provided, made, executed and delivered his certain bond of indemnity, with Wm. Verdenius and L. M. Philpott as surety on said bond, in the penal sum of \$600, and the said defendants Wm. Verdenius and L. M. Philpott then and there executed said bond as surety, and justified to the same in the sum of \$600 each, and the said bond was then and there, on the 31st day of May, 1902, delivered to the said town of Lind. That a copy of said bond is hereto attached and made a part of this complaint as fully as though incorporated herein, marked exhibit 'A.'

"(3) That between the 29th day of May, 1902, and the 28th day of July, 1902, plaintiff furnished materials, to wit: lumber and building hardware to the said W. E. Sutherland, for the construction of said bridge, and which entered into the construction of said bridge, of the value and reasonably worth the sum of \$243.87.

"(4) That no part of said account has been paid, and that plaintiff is the legal owner and holder thereof."

For a second cause of action the complaint alleges, in substance, that a copartnership, consisting of A. Boenig and C. Labes, at the special instance and request of defendant W. E. Sutherland, furnished certain hardware of the reasonable value of \$77.70, which hardware was used in the construction of said bridge, and that no part of the account had been paid, and that, prior to the action, the account was assigned by the said copartnership to the plaintiff. The prayer is for the aggregate of the two items above stated.

The complaint did not allege that the plaintiff or his assignor, within thirty days after the completion of the contract and the acceptance of the work, filed a claim with the town council of the said town, as required by 3 Bal. Code, §5927, Laws 1899, p. 172. The bond which is attached to the complaint is as follows:

"Know all men by these presents: That we, W. E. Sutherland as principal and Wm. Verdenius and L. M. Philpott as sureties, are held and firmly bound unto the town of Lind

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in the full sum of \$600, lawful money of the United States of America, to be paid unto the said town of Lind, or its successors or assigns, to which payment well and truly we bind our, and each of our heirs, executors and administrators, jointly, firmly by these premises. Sealed with our seals and dated this 29th day of May, 1902. The conditions of this are such that, whereas the above bounden W. E. Sutherland was, on the 28th day of May, 1902, awarded a contract for furnishing the material and the construction of a bridge on Van Marter avenue across the stream of Lind Coulee in the town of Lind, according to the plans and specifications now on file in the office of the clerk of said town and the contract to which this is attached, the same to be fully finished and complete on or before the 29th day of July, 1902. Now, therefore, if the said contractors shall, on or before said date, fully complete said bridge as above specified, and shall pay for all materials used therein, and shall not allow lien to attach to said property, then this obligation shall be null and void, otherwise to remain in full force and effect."

The bond is properly signed and verified, and marked filed with the town clerk. The sureties on the bond appeared in the action, and filed a demurrer to the complaint, upon the grounds that there is a misjoinder of parties, and that the complaint does not state a cause of action against them. This demurrer was overruled, and exception allowed to the ruling by the court. The sureties thereupon filed an answer, which was a general denial of all the allegations of the complaint. Thereafter the defendants, failing to appear at the trial, the court entered a judgment against the sureties on the bond for \$193.87, upon the first cause of action, and for \$77.70 upon the second, and against the principal contractor for the full amount claimed in the complaint.

Appellants contend upon this appeal, (1) that the complaint does not state a cause of action; (2) that the bond is void because it runs to the town, and not to the state; (3) that there is a misjoinder of causes of action, because the judgment against the sureties is in a different sum from

the judgment against the principal. It is sufficient to say, of the last contention, that the defect does not appear upon the face of the complaint. The record of the trial is not brought here, and, if there is error in this respect, such error is apparently in favor of the appellants. It is sufficient to say, of the second contention, that the apparent defects in the bond are evidently mistakes of the principal and his sureties, which they may not now take advantage of.

The first contention is more serious. The respondent has not appeared in this court, and we are not advised of the position which he takes upon the question. The statute provides, at Bal. Code, § 5925, that the contractor shall file such a bond as the one in question, for the protection of laborers and materialmen. Section 5927, as amended in 1899 (Laws 1899, p. 172), provides that the bond mentioned above,

“ . . . shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the State of Washington, and all such persons mentioned in said section 2415 shall have a right of action in his, her, or their own name or names on such bond, for the full amount of all debts against such contractor, or for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: *Provided*, That such persons shall not have any right of action on such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with and acceptance of the work by the board, council, commission, trustees, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or sub-contractor, or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows: . . . [Then follows a form of the notice.]

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Such notice shall be signed by the person or corporation making the claim or giving the notice; and said notice after being presented and filed shall be a public record open to inspection by any person."

This statute clearly makes the right to maintain the action upon the bond depend upon the notice provided for therein. This provision was for the benefit of the sureties on the bond. Their liability thereon ceased as to the class of persons designated, if no such notice or claim was filed within the time. It was therefore incumbent upon the plaintiff to allege and prove the fact that such notice was given within the time, because that fact was a necessary one to give a cause of action. Without such fact, no action could be maintained by the plaintiff, under the express terms of the statute. The complaint, not having alleged this fact, failed to state a cause of action, and the court should have sustained the demurrer.

The judgment is therefore reversed, and the cause remanded, with leave to the respondent to amend his complaint.

CROW, RUDKIN, FULLERTON, and ROOT, JJ., concur.

(No. 5632. Decided August 9, 1905.)

LEOPOLD M. STERN, *Appellant*, v. JASPER SILL, *Respondent*.

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—APPLICATIONS IN DIFFERENT COUNTIES—JURISDICTION—ABODE OF DECEDENT. Upon an application for the appointment of a general administrator, it sufficiently appears that the place of abode of the decedent, at the time of his death, was in the county of S, when several witnesses testified that they had known him as a resident of such county for from 26 to 40 years, and that he owned farms and other property in that county, although he died while in a hospital in the county of K, and one witness testified that he said he resided in that county.

EXECUTORS AND ADMINISTRATORS—JURISDICTION—ADMINISTRATION IN DIFFERENT COUNTIES—ABODE OF DECEDENT AT TIME OF DEATH. Upon the death of a resident of this state, exclusive jurisdiction to issue

general letters of administration rests in the superior court of the county of the decedent's residence or place of abode at the time of his death, regardless of a prior appointment of a special administrator in the county in which he died.

SAME—APPOINTMENT—RIGHTS OF NEXT OF KIN—WHO MAY RAISE OBJECTIONS. One who is not next of kin cannot object to the appointment of a general administrator on the ground that the time has not expired during which the next of kin have a preference right to apply for letters upon the estate.

SAME—APPLICATION—SUFFICIENCY. An application for letters of administration need not set forth the non-pendency of other applications.

SAME—DEFECTS—AMENDMENTS. A defective application for letters of administration will be deemed amended to conform to the proof in the absence of a showing of prejudice.

Appeal from an order of the superior court for Snohomish county, Denney, J., entered October 27, 1904, appointing an administrator of an estate, after overruling objections to the jurisdiction and hearing the evidence on the merits. Affirmed.

William Sheller (Leopold M. Stern, of counsel), for appellant.

Bell & Austin, for respondent.

Root, J.—On the 28th day of September, 1904, one James Long was in a hospital in Seattle, seriously ill. He requested that an attorney be sent to draft for him a will. Appellant was thereupon sent for and appeared, and was having some conversation with Long relative to his property and affairs, when said Long became suddenly worse, and died without having made any will. Appellant testified that Long told him that he resided in Seattle, and that he wished him (Stern) to look after his affairs in case of his death. Long had never known or seen appellant until that day, a couple of hours before his death. On the day following, appellant applied to the superior court, in King county, for special letters of administration upon said Long's estate, which were granted by said court.

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On October 1, 1904, respondent, Jasper Sill, a long-time friend and neighbor of decedent, applied to the superior court of Snohomish county for appointment as general administrator of the estate. This petition was set to be heard October 12, but the hearing was postponed until October 19, at which time appellant, in his individual capacity and as special administrator, appeared and objected to the jurisdiction of the court of Snohomish county, and to the appointment of said Sill. After hearing the evidence, the court appointed respondent Sill as general administrator, and directed that letters as such be issued to him, upon taking the affidavit and filing the necessary bond. Said Sill duly qualified, and assumed the duties of general administrator of said estate. From this order and decree, appeal is taken to this court.

It is the contention of appellant that the larger part of decedent's estate was in King county, and that the court of either Snohomish or King county might exercise jurisdiction of the estate—the question as to which, to be controlled by the priority of the application or of the adjudication of the jurisdictional question; and that the granting of special letters by the King county court was an assumption by that court of jurisdiction, which deprived the Snohomish county court of all right to deal with the estate. We do not think this contention can be upheld. Bal. Code, § 6087, provides as follows:

“Wills shall be proved and letters testamentary or of administration shall be granted,—(1) In the county of which deceased was a resident, or had his place of abode at the time of his death; (2) In the county in which he may have died, leaving estate therein, and not being a resident of the state; (3) In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death.”

While it is claimed by appellant that decedent said he was a resident of King county, yet, upon the hearing of

respondent's application, several witnesses testified that they had known him as a resident of Snohomish county for many years, two of them as many as twenty-six years, and one for over forty years; that he had owned farms and other property in that county, and was still the owner of property therein; that he had sent for some of his papers to be forwarded to him at Seattle, probably for the purpose of preparing his will. From the great preponderance of the evidence, it appears that Long had resided in Snohomish county for forty years, and was a resident thereof at the time of his death, and left estate therein. Under the statute, the superior court of that county had exclusive original jurisdiction to administer his estate, and to issue general letters of administration thereon. Where a resident of one county, in this state, dies in another county, with property or business matters requiring immediate attention, it is doubtless true that the superior court of the latter county has jurisdiction over the estate in that county, for the purpose of appointing a special administrator to conserve the property until an executor or general administrator is appointed by the court which has jurisdiction to administer the entire estate; but the appointment of such special administrator does not give such court jurisdiction to issue letters of general administration, nor in any way to interfere with the exercise of general jurisdiction by the court of the county where the decedent resided, or had his abode. The residence, or "place of abode," of the decedent in this state, fixes the jurisdiction of the court for the purpose of granting general letters.

It is urged by the appellant that respondent could not have been legally appointed, for the reason that forty days had not elapsed since the decedent's death, during which period a preference right is given to certain heirs and next of kin. We do not think this objection can be raised by appellant, as he does not claim to belong to any of the classes for whom such preference right is provided, except that of

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"principal creditors," to which respondent was found to belong. It is also urged that the petition is insufficient, because it did not set forth that there were no other applications for letters pending. We do not think this essential. Certain other defects in the application are suggested, but as the evidence was sufficient to, and did, establish all of the facts necessary, it will be assumed, in the absence of any showing of prejudice to the rights of others, that the application was amended to correspond with the proofs. Appellant claims that, upon the hearing of respondent's application, the court refused to admit in evidence a certified copy of some of the proceedings of the superior court of King county, in the special administration proceeding. This tendered evidence was immaterial, and its exclusion was not error.

Certain other errors are suggested, but it is urged by respondent that no proper exceptions were reserved. The exceptions are insufficient. However, an examination of the matters complained of convinces us that there are no errors which would justify a disturbance of the order and decree of the trial court. The same is therefore affirmed.

MOUNT, C. J., and CROW, J., concur.

FULLERTON, J., concurs in the result.

RUDKIN, J. (concurring).—When a resident of this state dies, I am of the opinion that jurisdiction to appoint either a special or general administrator is vested exclusively in the superior court of the county in which the decedent resided at the time of his death. For this reason I think the appointment of a special administrator by the superior court of King county, under the circumstances stated in the opinion of the court, was without jurisdiction and utterly void. I therefore concur in the judgment.

(No. 5631. Decided August 2, 1905.)

J. F. Cox *et al.*, Respondents, v. CAMERON LUMBER
COMPANY, LIMITED, Appellant.¹

CONTRACTS—LEGALITY—CUTTING TIMBER ON PUBLIC LANDS—PUBLIC POLICY—NOTICE OF TITLE OF GOVERNMENT—CAVEAT EMPTOR—WAIVER OF OBJECTIONS—PLEADINGS—OBJECTIONS FIRST RAISED IN SUPREME COURT. A defendant who scripped government land, and entered into a contract expressly reciting that it owned the lands, whereby the plaintiffs were employed to cut the timber therefrom, cannot, for the first time in the supreme court, set up the title of the government and the illegality of the contract as a defense to an action for breach of the contract, where the plaintiffs were not aware of defendant's want of title; since it was not incumbent upon them to investigate the title under the doctrine of caveat emptor, and violation of the law not being contemplated, the contract was not void on the ground of public policy, to the extent of requiring a court on its own motion to so declare, where the parties had failed in their pleadings to allege the illegality.

CONTRIBUTION — JOINT WRONG-DOERS — COMPROMISE OF PROSECUTION—LEGAL LIABILITY TO MAKE PAYMENT—CUTTING TIMBER ON GOVERNMENT LAND. Where one employed to cut timber on lands supposed to belong to another is prosecuted for unlawfully cutting timber on government lands, and compromises the suit by the payment of \$2.50 per acre, under the act of June 3, 1878, he cannot recover from his employer the amount so paid; since, if guilty, there can be no contribution among wrong-doers; and if not guilty, he was under no legal liability to make the payment in compromise of the prosecution.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 3, 1904, upon the special verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action on contract. Modified.

John B. Goode, Forster & Wakefield, H. M. Stephens and W. J. C. Wakefield, for appellant, contended among other things, that the plaintiffs were charged with notice that the law did not subject unsurveyed lands to forest reserve selections. *Columbia etc. R. Co. v. Seattle*, 33 Wash. 513,

¹Reported in 82 Pac. 116.

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Citations of Counsel.

74 Pac. 670; Jones, Evidence, § 2023; 30 Stats. 36; 31 Stats. 614, 1037; 2 Supp. Rev. Stats., pp. 625, 626, 1435, 1534. And, also, that a patent could not have issued for unsurveyed land. *United States v. Pacheo*, 22 How. 225, 16 L. Ed. 306; *Maguire v. Tyler*, 8 Wall. 650, 19 L. Ed. 320; *Paxton v. Griswold*, 122 U. S. 441, 7 Sup. Ct. 1216, 30 L. Ed. 1143; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920. No equitable title is acquired under such selection. *Kern Oil Co. v. Clarke*, 30 Land Dec. 550; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687. The cutting of timber thereon was unlawful, and the contract illegal. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127; *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1002; *Coe v. Low*, 36 Wash. 10, 77 Pac. 1077; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; *Stevens v. Perrier*, 12 Kan. 297; *Ladda v. Hawley*, 57 Cal. 51; *Swanger v. Mayberry*, 59 Cal. 91; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *Cunningham v. Metropolitan Lum. Co.*, 110 Fed. 332; *Teller v. United States*, 113 Fed. 273; *United States v. Denver etc. R. Co.*, 191 U. S. 84, 24 Sup. Ct. 33, 48 L. Ed. 106; *United States v. Basic Co.*, 121 Fed. 504; *Stubbs v. United States*, 111 Fed. 366; *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398. Where the evidence discloses the illegality of the contract, the court will not enforce it, regardless of whether or not the illegality is pleaded. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 79 Am. St. 961, 51 L. R. A. 889; *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803.

Graves & Graves and *B. H. Kizer*, for respondents. Some kinds of scrip may be used on unsurveyed lands. *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. The selections were valid when made, and vested equi-

table title. *Cosmos Exploration Co. v. Grey Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692; *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 911; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Shaw v. Kellogg*, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050. The presumption that the contract was lawful prevails in the absence of testimony to the contrary. *Waring v. Loomis*, 35 Wash. 85, 76 Pac. 510; *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803. The statement that defendant had title was a statement of fact which plaintiffs could rely upon. *Steiner v. Trantum*, 98 Ala. 315, 13 South. 365; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 South. 469, 100 Am. St. 45; *Murphy v. Olberding*, 107 Iowa 547, 78 N. W. 205; *De Wolf v. Williams*, 69 N. Y. 621; *Pichler v. Reese*, 171 N. Y. 577, 64 N. E. 441. Recovery cannot be defeated where the plaintiff had no knowledge of the illegality. *Montefiori v. Montefiori*, 1 W. Black. 364; *Berkholder v. Beetem's Adm'r*, 65 Pa. St. 496; *Reynell v. Sprye*, 1 D. M. G. 660; 2 Pomeroy, Eq. Jur. § 942; *Baehr v. Wolf*, 58 Ill. 470; *Barnes v. Brown*, 32 Mich. 145; *Ford v. Harrington*, 16 N. Y. 285; *Melbye v. Melbye*, 15 Wash. 648, 47 Pac. 16; *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270; *Hinsdill v. White*, 34 Vt. 558; *Harrington v. Grant*, 54 Vt. 236. The illegality not appearing from the plaintiffs' case, it could not be shown by the defendant, because it was not pleaded. *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; *Hendrickson v. Evans*, 25 Pa. St. 441; *Cardwell v. Kelly*, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240.

RUDKIN, J.—On the 8th day of October, 1901, the plaintiffs and the defendant entered into a written contract, whereby the plaintiffs agreed to cut, from lands owned by the defendant, on the Little North Fork of the Cœur d'Alene river, as per plat and description attached to the contract, not less than four million, and not more than

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ten million, feet of logs, and to deliver the same in the Cœur d'Alene river, below the Old Mission. The logs were to be delivered not later than July 1, 1903, and as much earlier in that year as possible. The defendant agreed to pay at the rate of \$4.12½ per thousand for all logs so delivered, and to advance \$3 per thousand on the logs whenever two hundred thousand feet, or more, were banked on or in the Little North Fork of the river. The defendant further agreed to construct a road to the plaintiffs' camp, by the nearest and most practicable route, for the purpose of furnishing the camp with supplies, the road to be completed not later than June 15, 1902. Under this contract the plaintiffs cut, and placed in the Little North Fork of the Cœur d'Alene river, 3,700,000 feet of logs, and received, on account thereof, the sum of \$10,880.89. The plaintiffs brought this action to recover damages for a breach of the above contract.

The complaint alleged the execution of the contract, and that the contract was fully performed by the plaintiffs, until they were compelled by the defendant to cease work under it, on or about the 6th day of December, 1902. The complaint further alleged, as breaches on the part of the defendant, that the defendant failed and refused to construct the road to the plaintiffs' camp, as agreed, and that the defendant stopped work under the contract as above stated. As a second cause of action, the complaint alleged that the plaintiffs were directed by the defendant to cut and remove timber from public lands of the United States; that they were indicted therefor, in the district court of the United States for the district of Idaho; that the defendant failed and refused to defend them, or give them counsel or assistance; and that the plaintiffs paid, and became liable to the United States in the sum of, \$1,000 for cutting timber on four hundred acres of public land.

The plaintiffs prayed judgment as follows: For \$219.11, due on account of logs actually furnished and delivered;

\$14,000 on account of profits on the uncompleted portions of the contract; \$5,000 for failure to construct the road as agreed, and \$1,000 paid the government, as alleged in the second cause of action. The jury returned a general verdict in favor of the plaintiffs in the sum of \$8,589.11. The jury also returned special findings, showing the items which made up their general verdict. The substance of these special findings was: For loss of profits, \$4,000; for failure to construct road, \$4,189.11; on account of second cause of action, \$400. A motion for a new trial was denied, and from the judgment entered on the verdict of the jury, this appeal is taken.

The principal contention of the appellant, as to the first cause of action, and the only one urged in the oral argument before this court, is that the contract in suit is illegal and void, and that no action can be founded thereon. This contention arises out of the following state of facts: Some time before the contract was entered into, the appellant made forest reserve scrip selections of extensive tracts of unsurveyed public lands, along the Little North Fork of the Cœur d'Alene river, in the state of Idaho, under the act of June 4, 1897, 2 U. S. Comp. St. 1901, p. 1541, and the lands so selected are the lands referred to in the contract in suit. It is now maintained that these selections were unauthorized and void, for the reason that unsurveyed public lands were not subject to selection under said act; that the lands referred to in the contract in suit were therefore public lands of the United States; that the contract contemplated the cutting and removal of timber from such public lands, and was and is against public policy and void.

The contract was not illegal for any reason appearing on its face, as it expressly provided that the timber was to be cut from lands owned by the appellant. Nor was there any suggestion in the answer that the contract was illegal or void. On the contrary, the appellant itself interposed a counterclaim, and asked damages for the breach

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of the same contract. The defense of illegality in the contract cannot, therefore, prevail, unless a case is presented such as requires the court to interpose, of its own motion, and stop the proceedings, on grounds of public policy. We are satisfied that no such case is presented here. The utmost that is claimed against the respondents is, that they knew the land was unsurveyed and knew that the appellant had scripped it. It does not necessarily follow from this that the appellant had no title.

The appellant contends, however, that it was the duty of the respondents to investigate the nature and character of its title, and had they done so, the law would charge them with notice that the appellant had no title, and that the title vested in the United States. No such duty rested upon the respondents. In the case of sales, or contracts of sale, this court has strictly enforced the doctrine of *caveat emptor*, but this is not such a case. It will scarcely be maintained, as a rule of law, that a party, entering into a contract to perform certain acts on the lands of the other party to the contract, is required to investigate the nature of the title of such other party, at his peril, and, if he does not, and the performance of the contract will result in a trespass on the lands of a third person, the contract is void *ab initio*. In justice to both parties, we must presume that they supposed the appellant had a right to cut timber on the lands described in the contract. The defense now interposed is manifestly an afterthought, and neither the pleadings nor the evidence warrant the court in holding, of its own motion, that the contract of the parties contemplated a violation of the laws of the United States. The contract was either valid or void, in its inception. Nearly all the errors assigned as to the first cause of action relate to the defense we have just considered. We have examined the other assignments, and find no error in the record as to this cause of action.

By the second cause of action, the respondents sought to

recover money paid the United States in compromise and settlement of a criminal prosecution. This money was paid under the provisions of section 5, of the Act of June 3, 1878, 2 U. S. Comp. St., 1901, p. 1530, which reads:

"That any person prosecuted in said states and territory for violating section 2461 of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre, for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same."

We confess we are at a loss to know how a recovery as to this cause of action can be sustained. If the respondents were guilty, there can be no recovery, as the law permits no contribution between wrongdoers. The respondents contend that they were not guilty, but that they compromised the prosecution as a matter of precaution, and as the easiest way out of the difficulty. They contend further that the compromise was not conclusive evidence of guilt, in this case. We agree entirely that the compromise was not conclusive evidence of guilt, if indeed it was competent at all; but, for the sake of argument, let us concede that they were not guilty. When one person seeks to recover from another money which he has paid to a third person, he must show that the money was paid by request of the party from whom he seeks a recovery, or he must show that there was a legal obligation on his part to pay. Suppose a party is sued as an endorser on a negotiable instrument for a large sum; he feels conscious that he is not liable, but, owing to the uncertainty as to the outcome, he compromises the claim for a lesser amount. He then sues the principal debtor to recover the sum paid. Must he not show that the demand against him was well founded in law? So in this case, before the respondents can recover the amount paid the government from the appellant, they must show that there was a legal obligation on their part

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to make the payment, and they cannot show this without showing that they were guilty of the offense charged. So that, whether the respondents were guilty or not, they cannot recover from the appellant the amount paid the United States in compromise of the criminal charge.

The judgment of the court below is therefore modified by eliminating therefrom the sum of \$400, and as thus modified, the judgment is affirmed. The appellant will recover its costs on the appeal.

MOUNT, C. J., FULLERTON, ROOT, and CROW, JJ., concur.

(No. 5509. Decided August 9, 1905.)

L. NICKELSON, *Respondent*, v. CAMERON LUMBER COMPANY, LIMITED, *Appellant*.¹

CORPORATIONS—LIABILITY FOR MALICIOUS PROSECUTIONS—ACTS OF GENERAL MANAGER IN INSTITUTING CRIMINAL SUIT—PAYMENT OF EXPENSES—EVIDENCE OF AUTHORITY—SUFFICIENCY. A general manager of a corporation renders his company civilly liable for a malicious prosecution, where it appears that he was the statutory agent and only officer of the corporation in Idaho, that he prosecuted the criminal charge in question, maliciously and without probable cause, and to gain possession of government lands for the corporation, from which it then cut and removed the timber, that the corporation paid witness fees and employed a private counsel in the criminal case, and that the officers of the company declined to prevent the prosecution because, as stated, the manager had full control of the company's business in that state.

SAME—KNOWLEDGE OF SUIT—EVIDENCE OF CONVERSATIONS WITH OFFICERS. In an action against a corporation for a malicious prosecution, testimony of a conversation with its officers relative to the suit is admissible to show the company's knowledge of the suit, and of the agency through which it was instituted.

MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS—HARMLESS ERROR. In an action for malicious prosecution, error cannot be predicated upon an instruction to the jury concerning probable cause, in that it was a question of law for the court, where the instruction was correct and the question was properly decided.

¹Reported in 81 Pac. 1059.

PUBLIC LANDS—CUTTING TIMBER—ACTION FOR DAMAGES—RIGHTS OF SETTLER. A settler on unsurveyed government land cannot recover damages for the cutting and removal of the timber, or for permanent injury to the freehold, since the title and right of action therefor is in the government.

APPEAL—DECISION—REMITTING EXCESS. Upon reversing a case for error in including an item of damages fixed by special verdict, the judgment will be allowed to stand if the erroneous item is remitted.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered July 2, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Reversed conditionally.

Forster & Wakefield, John B. Goode, A. W. Witherspoon, and W. J. C. Wakefield, for appellant.

Post, Avery & Higgins, for respondent.

RUDKIN, J.—In the month of March, 1902, the plaintiff in this action settled upon one hundred and sixty acres of unoccupied, unsurveyed, public land in the state of Idaho, which will constitute a part of section 16, township 51, range 1, west, Boise Meridian, when the public surveys are extended. On the 9th day of September, 1902, a criminal complaint was lodged against the plaintiff, in the probate court of Kootenai county, in the state of Idaho, charging him with forcibly and unlawfully entering and detaining said premises against the defendant, which constitutes a misdemeanor under the laws of that state. The plaintiff was arrested on said charge, tried, and acquitted. This action was brought to recover damages for malicious prosecution.

The complaint alleged that the prosecution was instituted by the defendant wantonly, maliciously, and without probable cause, and for the purpose of unlawfully obtaining possession of the premises above described, and maliciously depriving the plaintiff of such possession; that, as soon as plaintiff was arrested on said charge, the defendant cut and removed the timber from said land, and destroyed the said

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land for the purpose for which it was settled upon by the plaintiff; that the plaintiff was compelled to employ counsel and pay witness fees and expenses in his defense against said charge, to his damage, in all, in the sum of \$15,000, for which he prays judgment. The case was tried before a jury, and resulted in a general verdict in favor of the plaintiff, in the sum of \$2,550, accompanied by a special finding that \$1,500 of that amount was for injury to the real estate in controversy between the parties. A motion for a new trial was denied, and a judgment entered on the general verdict. From that judgment this appeal is prosecuted.

We will now consider briefly the different errors assigned. It is first contended that D. R. Cameron, as general manager of the appellant corporation, had no authority, by virtue of his position, to commit an unlawful or tortious act for which the corporation would be liable. The law undoubtedly is as contended by the appellant, but there is no room for its application in this case. The testimony shows that the appellant is a corporation, organized under the laws of this state, and was, at the time complained of, extensively engaged in the lumber business, in the state of Idaho, and had, or claimed, large tracts of timber land there. Cameron was the general manager of the appellant, and its statutory agent in Idaho. He was the only officer of the company residing in that state, and had full charge of its business there. The criminal charge in question was made and prosecuted to a final judgment under his direction, and by his authority. He employed, and the appellant paid, private counsel to prosecute the case. Some, at least, of the witnesses for the prosecution were paid by the appellant. The general manager, and other employees of the appellant, attended the trial as witnesses for the prosecution. After the arrest, and before the trial of the criminal charge, the president and secretary and treasurer of the appellant were interviewed by one of the attorneys for the respondent

in relation to the prosecution of the criminal charge. These officers were informed by the attorney that the prosecution was unwarranted; that the premises were not unlawfully or forcibly entered or detained by the respondent; and that the appellant had no interest in or claim to them. The attorney further asked that a survey be made to determine the questions at issue, and that the general manager of the appellant be instructed to desist from further prosecuting the respondent. These officers communicated with the general manager over the telephone, and afterwards informed the attorneys for the respondent that they could do nothing; that Cameron had full charge in Idaho, and that matters would have to take their course. After the arrest of the respondent, the appellant, through its officers and employees, cut and removed the timber from the land in controversy, and converted it to its own use. Under these facts, it cannot be claimed for a moment that the appellant is not civilly responsible for the direct and approximate results of the prosecution.

Objection is also made to the testimony of one of the respondent's attorneys, relating to conversations between himself and the president and secretary and treasurer of the appellant, in regard to the prosecution. This conversation was competent and material for the purpose of showing that the corporation had knowledge of the prosecution while the same was pending, and of the agency through which the prosecution was brought about. The letter from respondent's attorneys to appellant, objected to, had a direct bearing upon the settlement pleaded in the answer, and testified to by the secretary and treasurer of the appellant, and was competent in that connection.

The appellant assigns as error the refusal of the court to grant a nonsuit, and the refusal to grant a new trial, on the ground of the insufficiency of the evidence. On this point we deem it sufficient to say that there was ample testimony to show that the prosecution was wholly unwarranted,

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and that it was waged from improper motives. The conclusion that it was malicious and without probable cause is almost irresistible.

Exception is also taken to an instruction on the question of probable cause. It is contended that probable cause is a question of law for the court, and should not be submitted to the jury. Whether this be true or not, the instruction was clearly right, and could not be prejudicial. Whether the question of probable cause is for the court or the jury, it was rightly decided in this case, and the appellant has no ground of complaint.

Other assignments of error relate to various rulings of the court in connection with the respondent's right to recover damages for cutting and removing the timber from the land in controversy. The appellant contends that, inasmuch as the land will be a part of section 16 when surveyed, it is the property of the state of Idaho, under its enabling act, and the respondent cannot recover damages for cutting timber thereon. The respondent, on the other hand, contends that, inasmuch as he settled upon the land before survey, he will have a preference right to enter the same as a homestead when surveyed, and the state of Idaho will be compelled to select other lands in lieu thereof. In the view we take of the law, it matters little which of these contentions is correct. Whether the land belongs to the state of Idaho, or is public, unsurveyed land of the United States, with no right in the respondent except that of a settler or squatter, there is no principle of law under which the respondent is entitled to recover damages for cutting or removing timber therefrom. The possession of the land was lawful, but his interest in the land at the time complained of was limited to the right of occupancy. In so far as the wrong complained of injured his possession or improvements, it was a trespass against him, and he has a right of action therefor. In so far as the wrong was a permanent injury to the freehold, it was a trespass against the United States,

and the right of action for such rests in the United States. Under the facts appearing in the record, the respondent himself could not lawfully cut the timber in the manner alleged, if at all. He had no title to the timber when cut, and could not recover it in an action of replevin, nor recover damages for its conversion. On the other hand, the parties who cut the timber were liable to prosecution at the suit of the United States, and the United States could recover the timber in an action of replevin, after its severance from the freehold, or damages for its conversion. *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54; *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778. In *Shiver v. United States*, the court said that the privileges of a homesteader with respect to standing timber are analogous to those of a tenant for life or for years. In *McKeen v. Gammon*, 33 Me. 187, an action was brought by a life tenant to recover damages for the cutting of timber. The court, in speaking of the right of action and the measure of damages, said:

"The plaintiff can recover no more damages than he has sustained, nor for the taking and carrying away the property of the defendant's wife. As in the case of a lease, if the lessor fells the trees, the lessee may maintain an action of trespass against him and will be entitled to recover damages adequate to the loss of his particular interest, and also for the entry into his land. But the interest of the body of the trees remains in the lessor, as parcel of his inheritance, who may punish the lessee in an action of waste, if he fells or damages any of them."

Again:

"If, then, the plaintiff should recover damages for the timber and wood, he would obtain what belongs to the wife of the defendant. But he can recover only the special damages, which he has sustained, for the breaking and entering his close, and for whatever has been carried away, which was necessary for the enjoyment of his life estate. If wood enough for fire wood, fencing, and building materials, was left in a situation as convenient and easy of access as it

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was before the trespass, the injury would appear to be confined to the breaking and entering upon the plaintiff's close."

The rights of the respondent in the land in question are shadowy, to say the least. As between him and the general government, he has no rights whatever. The United States may at any time withdraw the land from settlement, place it in a government reserve, or grant it to another. *Frisbie v. Whitney*, 9 Wall. 187. Indeed, so far as this respondent is concerned, it is doubtful if he has not pleaded himself out of court as to this item of damage. He alleges in his complaint that the appellant cut and removed the timber from the land, "and destroyed said land for the purpose for which it was settled by this plaintiff." The only inference from this is that the respondent settled upon the land for the purpose of acquiring the timber, and the testimony as to the character of the land gives color to this inference. It is questionable, therefore, whether the respondent's intentions were not unlawful, or whether he had any rights whatever in the land. But in any event, he could only recover for injury to his possession and improvements, and not for the cutting or removal of timber.

The judgment must therefore be reversed, and if the respondent, within thirty days from the filing of the remittitur in the court below, files a release of the \$1,500 item allowed by the jury for injuries to the land, the court will enter judgment for the respondent for the sum of \$1,050, with interest from date of the verdict, together with the costs in that court. If no such release is filed, the court will grant a new trial. The appellant will recover its costs in this court.

MOUNT, C. J., FULLERTON, ROOT, and CROW, JJ., concur.

(No. 5429. Decided August 14, 1905.)

JACOB SLAGHT, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

ADVERSE POSSESSION—AGAINST SETTLER ON PUBLIC LANDS—RAILROADS.—STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN—PATENT FROM GOVERNMENT. The statute of limitations does not begin to run in favor of a railroad as to its right of way across public lands, occupied by a settler under the homestead laws, until the patent to the land has issued by the government, since it would interfere with the primary disposal of the soil.

RAILROADS—RIGHT OF WAY—CONGRESSIONAL GRANT—OCCUPIED LANDS—RIGHTS OF SETTLERS—NECESSITY OF CONDEMNATION. The grant of a railroad right of way across public lands, under Act Cong., March 3, 1875, does not attach to land occupied by a settler and subject to his settlement rights, until after condemnation thereof, as provided in § 3 of the act.

RAILROADS—RIGHT OF WAY—USE FOR PUBLIC PURPOSES—EJECTMENT—POSSESSORY ACTION AGAINST COMPANY. A possessory action can be maintained to recover possession of a railroad right of way, used and occupied by a railroad company for its roadbed for public purposes, where proceedings are stayed and the only effect of the judgment is to compel the company to make compensation for the property taken.

SAME—ESTOPPEL—EXCUSABLE DELAY IN BRINGING SUIT. The owner of premises is not estopped to bring ejectment against a railroad to recover possession of a railroad right of way by reason of several years delay, where the property was in litigation between him and the railroad company's grantors during said time, and the ejectment was commenced shortly after the final determination of such litigation.

Appeal from a judgment of the superior court for Whitman county, Chester F. Miller, J., entered July 13, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court upon stipulated facts, in an action of ejectment. Affirmed.

John M. Bunn (*James B. Kerr*, of counsel), for appellants.
The defendant acquired title under the Act of March 3, 1875.

¹Reported in 81 Pac. 1062.

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Citations of Counsel.

18 Stat. 482; *Jamestown etc. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; *Pennsylvania Min. & Imp. Co. v. Everett etc. R. Co.*, 29 Wash. 102, 69 Pac. 628; *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578. Mere occupation, without filing the application, was not sufficient to defeat the grant. *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479; Act. Cong., Sept. 4, 1841, 5 Stat. 453; Act. Cong., March 3, 1843, 5 Stat. 619; *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111. The plaintiff's action is barred by the statute of limitations; he could maintain a possessory action prior to the issuance of a patent. *Brown v. Hartshorn*, 12 Okl. 121, 69 Pac. 1049; *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357; *French v. Cresswell*, 13 Ore. 418, 11 Pac. 62; *Burlington etc. R. Co. v. Johnson*, 38 Kan. 142, 16 Pac. 125. Or his possession could be protected by injunction. *Washington etc. R. Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 356. What he could grant by deed he could lose by lapse of time. U. S. R. S. § 2288. A possessory action will not lie. *New Orleans etc. R. Co. v. Jones*, 68 Ala. 48; *St. Julien v. Morgans etc. R. Co.*, 35 La. Ann. 924; *Louisville etc. R. Co. v. Berkey*, 136 Ind. 591, 36 N. E. 642; *Scarritt v. Kansas City etc. R. Co.*, 127 Mo. 298, 29 S. W. 1024; *St. Louis etc. R. Co. v. Foltz*, 52 Fed. 627; *Paterson etc. R. Co. v. Kamlah*, 42 N. J. Eq. 93, 6 Atl. 444; *Texas etc. R. Co. v. Jarrell*, 60 Tex. 267; *McAulay v. Western Vermont R. Co.*, 33 Vt. 311, 78 Am. Dec. 627; *Griffin v. Jacksonville etc. R. Co.*, 33 Fla. 606, 15 South. 338; *Taylor v. Chicago etc. R. Co.*, 63 Wis. 327, 24 N. W. 84; *Atlantic etc. R. Co. v. Barker*, 105 Ga. 534, 31 S. E. 452; *Fries v. Wheeling etc. R. Co.*, 56 Ohio St. 135, 46 N. E. 516; *Hooper v. Bridgewater*, 102 Mass. 512; *Chicago etc. R. Co. v. Englehart*, 57 Neb. 444, 77 N. W. 1092; *Northern Pac. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct.

756, 39 L. Ed. 873; *United States v. Lynch*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539; *Northern Pac. R. Co. v. Murray*, 87 Fed. 648. And the tendency in this state is to support the above rule in the Federal courts. *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Kaufman v. Tacoma etc. R. Co.*, 11 Wash. 632, 40 Pac. 137; *Seattle etc. R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 Am. St. 766, 54 L. R. A. 526.

Thomas Neill (W. E. McCroskey and A. A. Wilson, of counsel), for respondent.

RUDKIN, J.—In March, 1883, the plaintiff in this action established his residence on lots 10, 11, 14, and 15, of section 1, township 16 north, of range 45 east, of the Willamette Meridian, in Whitman county, and continued to reside thereon until the year 1897. On the 31st day of October, 1887, he made application at the proper land office to enter said lands under the homestead laws of the United States, alleging settlement on the 4th day of March, 1883. The Northern Pacific Railroad Company, having prior to said application selected said tracts as indemnity under the act of July 2, 1864, was notified of the plaintiff's application by the register and receiver of the local land office. The contest thus instituted was carried by appeal to the Secretary of the Interior, and resulted in a final decision in the plaintiff's favor on the 20th day of May, 1896. On the 20th day of April, 1897, a homestead patent issued to the plaintiff.

During the year 1886 and the first half of the year 1887, the Spokane and Palouse Railway Company, a corporation organized and existing under the laws of the territory of Washington, constructed and completed a railroad upon and over lots 10 and 11, above described, at great expense; and ever since such construction, said railroad has been operated daily, carrying freight, passengers, and United States mail.

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Since 1886, the Spokane and Palouse Railway Company and its successor in interest have claimed a right of way over said lots 10 and 11, for said railway, 100 feet wide on each side thereof.

It would be possible for the Northern Pacific Railway Company, successor in interest to the Spokane and Palouse Railway Company, to carry freight, passengers, and United States mail, over a right of way, across said described lands, not exceeding twenty-five feet in width, and a space one hundred feet square would permit of the erection of a depot at the town of Palouse; but great inconvenience would result to the citizens of Palouse and vicinity, and to said railway company, if these were all the facilities had for receiving and delivering freight, passengers, and mail. For the convenient, prompt, and expeditious handling of freight and the erection of warehouses and elevators for the storing of grain and wheat, it is necessary to have a right of way two hundred feet in width, across said land, as claimed by the railway company.

At the time said railway was surveyed and constructed, the plaintiff resided upon said lands, knew of its construction and of the expenditure of large sums of money in such construction. About the time the surveyors entered upon said lands, the plaintiff published a notice in the Palouse News, a newspaper printed and published in the vicinity of the land, forbidding all persons to trespass thereon, but this was the only objection made to the construction of the road. In the month of August, 1887, the Northern Pacific Railroad Company, claiming to be the owner of lots 10, 11, 14, and 15, above described, conveyed the same to one William L. Powers, and on the 14th day of September, 1887, Powers conveyed to the Spokane and Palouse Railway Company, a right of way two hundred feet wide across said lots 10 and 11, being the same right of way then claimed by the Spokane and Pa-

louse Railway Company, and now claimed by the Northern Pacific Railway Company.

On the 12th day of May, 1897, the Spokane and Palouse Railway Company, William L. Powers, and others, as successors in interest of Powers under the above deed of conveyance from the Northern Pacific Railroad Company, brought an action in the superior court of Whitman county for the purpose of having the plaintiff in this action declared a trustee of lots 10, 11, 14, and 15, above described, for the plaintiffs in said last mentioned action. A demurrer to the complaint in said action was sustained and a final judgment entered for the defendant therein, the plaintiff herein. Said judgment was thereafter affirmed by the supreme court of the State of Washington and by the supreme court of the United States.

No suit or action of any kind was commenced by this plaintiff to recover the possession of said right of way, or to enjoin or restrain the construction of said road or its maintenance over said right of way, or to recover damages for the taking or retention of said right of way, prior to the commencement of this action. This action was commenced shortly after the decision of the supreme court of the United States in the action above referred to. The summons was served on the Northern Pacific Railway Company on the 9th day of October, 1901, and the complaint filed on the 4th day of June, 1902. The Spokane and Palouse Railway Company conveyed the right of way in controversy to the Northern Pacific Railway Company on the 21st day of February, 1889. The foregoing facts, and others not deemed material, are set forth in the pleadings and agreed to by the parties.

This action was brought to recover the possession of the right of way, above referred to, across lots 10 and 11. The court below awarded to the plaintiff the possession of all of said right of way, except a strip of land twenty-five feet in width along which the road is constructed, and

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a parcel of land one hundred feet square for a depot site, but stayed execution on the judgment for a period of ninety days, in order that the Northern Pacific Railway Company might have an opportunity to condemn and appropriate the remainder of the right of way. From the judgment so entered, the defendants appeal.

From the foregoing facts, the appellants make the following contentions: (1) That the Northern Pacific Railway Company, as successor in interest of the Spokane and Palouse Railway Company, has a right of way two hundred feet in width across said lots 10 and 11, by adverse possession, under the laws of the State of Washington; (2) that the Northern Pacific Railway Company, as successor in interest of the Spokane and Palouse Railway Company, has a right of way two hundred feet in width across said lots 10 and 11, under the act of Congress of March 3, 1875, granting rights of way over public lands to certain railway companies; and (3), that inasmuch as the Northern Pacific Railway Company is in possession of the right of way, using the same for public purposes, a possessory action to recover the land will not lie.

(1) The Northern Pacific Railway Company and its predecessor in interest have held the right of way in controversy openly, notoriously, adversely, and under color of title and claim of right for more than ten years prior to the commencement of this action, and, unless there was something in the nature of the respondent's title, or in the pending litigation, that prevented the operation of the state statute of limitations, the defense of adverse possession must prevail. The appellants contend that the respondent, by virtue of his settlement rights, might have enjoined the Spokane and Palouse Railway Company from entering upon the land or from interfering with his possession, or might have recovered damages for injury to his possession, in an action at law. This is no doubt true; but the respondent holds title under a patent from the United States, and he

contends that the state statute of limitations was dormant until patent issued. This presents a Federal question and we must look to the decisions of the supreme court of the United States for our guidance.

Under the laws of Missouri, a homesteader or pre-emptioner may maintain an action of ejectment from the date of his filing, to recover possession of the land embraced in his entry. By reason of this fact, the supreme court of that state held that the state statute of limitations commenced to run as soon as the right of entry accrued, notwithstanding the title was in the United States. The case was taken to the supreme court of the United States, and in *Gibson v. Chouteau*, 13 Wall. 92, the judgment was reversed, the court saying:

"But neither in a separate suit in a federal court, nor in answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under state legislation, in whatever form or tribunal such occupation be asserted."

In a later case, *McIlhinney v. Ficke*, 61 Mo. 329, the supreme court of Missouri says:

"The Supreme Court of the United States in *Gibson v. Chouteau* (13 Wall. 92), have held, that although the patent has issued to the same person who entered the land, and although our statute allows the holder of the entry to get possession by ejectment, so soon as his entry is made, and although our statute of limitations begins to run from the date of the right of entry, yet as the legal title remained in the United States after the entry and up to the date of the patent, our statute of limitations had no effect as a

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bar, because it interfered with the primary disposal of the soil."

The doctrine of the *Gibson* case is reaffirmed in *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. 83, where it is held that the doctrine of relation does not apply in such cases, and that the state statute of limitations does not commence to run, even upon issuance of final receipt after full payment. In the latter case, the patent did not issue for nineteen years after final receipt. This rule has been uniformly followed in the state courts. The plea of title by adverse possession cannot, therefore, prevail.

(2) Has the appellant railroad company a right of way under the act of March 3, 1875? This act undoubtedly grants a right of way over all public lands and the grant attaches immediately upon compliance with the requirements of the act. And, as held by the court in *Jamestown etc. R. Co. v. Jones*, 177 U. S. 125, 20 Sup. St. 568, a settler upon the land after the grant attaches takes it subject to the grant. We are of the opinion, however, that the grant does not attach to lands occupied by a settler and subject to his settlement rights, until after the condemnation provided for in section 3 of the act. It seems to have been the purpose of Congress to grant a full and complete right of way over lands occupied by a settler, as soon as the settler's rights were acquired by condemnation, and not to grant the right over occupied lands, independent of condemnation. If lands along the line of the road are occupied by a settler and his rights are not acquired by condemnation, and afterwards ripen into a patent from the government, he acquires the full legal title, free from any claim on the part of the company.

This precise question—in fact every question involved in this case—was before the supreme court of Colorado in *Denver etc. R. Co. v. Wilson*, 28 Colo. 6, 62 Pac. 843. In that case, Wilson, the plaintiff, filed upon the land over which the right of way was claimed, under the preemption

laws of the United States, on the 20th day of June, 1885. In July, 1887, after complying with all the requirements of the act of 1875, except to condemn the rights of Wilson, the railway company, defendant, obtained a deed to the right of way from one Bennet, who was holding the lands adversely to Wilson and contesting his rights before the department. The railway company immediately entered into possession of the right of way and built its road. On July 15, 1896, Wilson obtained a patent for the land from the United States, and soon thereafter, brought an action of ejectment, styled an action to recover possession of real property by the Colorado code, to recover possession of the right of way. The defendant, there as here, claimed a right of way under the act of 1875, under the state statute of limitations, and by estoppel. The court held, however, that the railway company acquired no rights over the pre-emption claim of the plaintiff without condemnation, and that the full legal title inured to him under the patent from the United States. In answer to the plea of the statute of limitations, the court said:

"The authorities are that, as between rival individual claimants of land acquired from the United States government, the statute of limitation does not begin to run in favor of an adverse claimant in possession, as against an entryman, until the latter, by a full compliance with the law, becomes entitled to a patent."

In *Larsen v. Oregon R. & Nav. Co.*, 19 Ore. 240, 23 Pac. 974, it was held that a railway company acquired no rights, under the act of 1875, as against a homestead claimant, without condemnation. In *Enoch v. Spokane Falls etc. R. Co.*, 6 Wash. 393, 33 Pac. 966, this court held that the grant under the act of 1875 "is not operative upon lands to which private rights have previously attached." See, also, *Red River etc. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 299; *Jamestown etc. R. Co. v. Jones*, 7 N. D. 619, 76 N. W. 227.

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We think the decisions of the supreme court of the United States in *Washington etc. R. Co. v. Osborn*, 160 U. S. 103, 16 Sup. Ct. 219, and *Spokane Falls etc. R. Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, arising under the act of 1875, tend to sustain these conclusions. We are therefore of opinion that the appellants have no rights, as against the respondent, under the act of 1875.

(3) Can a possessory action be maintained to recover the possession of a railroad right of way under the circumstances disclosed by the record before us? In *Biles v. Tacoma etc. R. Co.*, 5 Wash. 509, 32 Pac. 211, a similar case, a judgment in ejectment, in favor of the plaintiff, was affirmed by this court, but the right to maintain such an action was not discussed. It appears from the dissenting opinion in *Downs v. Seattle etc. R. Co.*, 5 Wash. 778, 32 Pac. 745, 33 Pac. 973, that the judgment in the *Biles* case was in all respects similar to the judgment in this case, and the procedure was approved by the dissenting judges. In *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847, the court enjoined the maintenance of a ditch across the land of the plaintiff, where the right of way had been taken and the ditch constructed without condemnation, but stayed proceedings for thirty days to allow condemnation proceedings to be instituted. This judgment was afterwards affirmed by this court, but the question of procedure was not discussed. In *Kakeldy v. Columbia etc. R. Co.*, 37 Wash. 675, 80 Pac. 205, this court says:

"An owner of land, who stands by and without protest sees a railroad constructed thereon, is estopped thereafter to maintain an action in ejectment or a suit for injunction to prevent the operation of the road. His remedy is limited to an action for damages for his compensation;"

citing *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756; *Northern Pac. R. Co. v. Murray*, 87 Fed.

648, and other cases fully sustaining the rule there announced.

On the other hand, in *New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, the supreme court of the United States reversed a decree granting an unconditional injunction,

“ . . . with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.”

The authorities are divided on this question. If a judgment in ejectment at law, or decree of injunction in equity, would have the effect of stopping the operation of the railroad, or disabling it from discharging its duties to the public, there would be strong and controlling reasons why such judgment or decree should not be awarded. But, if proceedings are stayed as in this case, and the only effect of the judgment in ejectment is to compel the railway company to make compensation for the property taken, we see no valid objection to such proceeding, on the ground of public policy or otherwise.

While there has been apparent delay on the part of the respondent in the assertion of his rights, it must be remembered that the property was in litigation, from 1887 until 1901, between the respondent and those under whom the appellants claim. If the value of the land has increased or conditions changed since the right of way was taken, it is the misfortune of the appellants. This branch of the case involves no question of Federal law.

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There is no error in the record, and the judgment is affirmed.

FULLERTON, CROW, and ROOT, JJ., concur.

(No. 5551. Decided August 15, 1905.)

MARY A. GAFFNEY, *Respondent*, v. RICHARD SAXE JONES,
Appellant.¹

JUDGMENTS—REVIVAL—LIMITATION OF ACTIONS—CHANGE OF REMEDY IN JUDGMENT ON TORT—CONSTITUTIONAL LAW—CONTRACTS—IMPAIRMENT OF OBLIGATION. LAWS 1897, p. 52, repealing the statute with reference to the revival of judgments, and forbidding any action upon a judgment after a stipulated time, is not unconstitutional as to existing judgments founded upon tort, since the obligation of a contract is not impaired, and the remedy may be changed at the will of the legislature.

Appeal from an order of the superior court for King county, Hatch, J., entered December 7, 1904, upon findings in favor of the plaintiff, after a hearing on the merits, reviving a judgment. Reversed.²

Ernest B. Herald, for appellant.

Joseph M. Glasgow, for respondent.

ROOT, J.—Respondent recovered judgment upon an action in tort against appellant on the 9th day of February, 1897, in the superior court in King county. Upon the 19th day of January, 1904, respondent commenced this proceeding to revive said judgment. From an order of revival, this appeal is taken.

Many errors are assigned; but in view of our conclusion as to the sufficiency of the petition and findings, it is unnecessary to consider any except that assigned upon the

¹Reported in 81 Pac. 1058.

²NOTE. A petition for rehearing has been granted. REP.

trial court's action in denying appellant's motion for dismissal. The question presented is as to the right of respondent to have a judgment of this character revived. The act of March 6, 1897 (Laws 1897, p. 52), reads as follows:

"§ 1. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.

"§ 2. No suit, action, or other proceedings shall ever be had on any judgment rendered in the State of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.

"§ 3. When the lien of any judgment, as specified in section 1 of this act, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act.

"§ 4. Sections 462 and 463 of volume 2, Hill's Code of Washington, relating to a renewal of judgments, are hereby repealed."

It is urged by respondent that these statutory provisions are unconstitutional; and in support of her contention, the following cases are cited, to wit: *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216.

An examination of these decisions will show, however, that the reasons for holding the statute invalid, as applied to them, does not obtain with reference to the facts in the case at bar. It was held, in those cases, that the statute was obnoxious to the constitution in so far as it affected contracts, or judgments based upon contracts, entered into prior to the enactment of the statute. This holding was upon the ground that the legislative act would be an impairment of contractual obligations, that in entering into such contracts the parties contemplated the right to enforce them by judgments which could be revived under the statutes existing when the act of 1897 was passed, and that

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this was a property right which the legislature could not take away.

The judgment in the case at bar was based upon tort. The facts upon which the right of action accrued were not of a contractual character. While a judgment is sometimes spoken of as a contract and for some purposes is treated as such, yet it will be readily seen that it is not such in the sense that would render the statute an impairment of any compact made by the parties. There was, between the parties, no agreement forming the basis of the action, no consideration parted with in contemplation of the right to revive a possible future judgment. As applied to a judgment in tort, we perceive nothing in the statute contravening any provision of the organic law. *Louisiana ex rel. Folsom v. Mayor etc. of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211; *Garrison v. New York*, 21 Wall. 196; *Morley v. Lake Shore etc. R. Co.*, 146 U. S. 162, 13 Sup. Ct. 54; *McCoun v. New York Cent. etc. R. Co.*, 50 N. Y. 176; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; 19 Am. & Eng. Ency. Law (2d ed.), 168, 169. That the remedy may be changed at the will of the legislature, provided the obligation of contract is not impaired, is, of course, elementary.

Appellant's motion for a judgment should have been sustained. The order appealed from is reversed, with instructions to the honorable superior court to dismiss the petition.

CROW, FULLERTON, and RUDKIN, JJ., concur.

(No. 5652. Decided August 15, 1905.)

ANNA SHAW, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—FALL FROM TEMPORARY SIDEWALK — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. In an action for personal injuries sustained in a fall, in the night-time, from a temporary unguarded sidewalk, the evidence does not show, as a matter of law, that the plaintiff was guilty of contributory negligence, where she was not aware of the changed and dangerous condition of the street, the night was dark, and no signal lights or guards were provided.

DAMAGES—EXCESSIVE VERDICT—REDUCTION. A verdict for \$8,000 damages for personal injuries sustained in a fall from a temporary sidewalk is excessive, where it appears that the plaintiff, a woman forty-three years of age, engaged in keeping boarders and capable of earning from \$60 to \$90 per month, received a serious fall, but was able to walk several blocks and do some shopping, that she was confined for six weeks and incurred \$250 expense for medical attendance, that the permanent injury principally relied upon was aggravation of Bright's disease and other ailments previously existing, and there was much evidence of experts indicating that this was not attributable to the fall; and in such case passion or prejudice is established without other evidence, and the verdict should be reduced to \$4,000.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 6, 1904, upon the verdict of a jury rendered in favor of the plaintiff for \$8,000, for personal injuries sustained in a fall from a sidewalk. Affirmed upon condition of remitting \$4,000.

Scott Calhoun (Roberts & Leehey, of counsel), for appellant.

John B. Hart, for respondent.

Root, J.—Respondent brought this action to recover damages for personal injuries sustained in falling by reason of an unprotected and dangerous temporary sidewalk, upon one of the public streets in the city of Seattle. From a

¹Reported in 81 Pac. 1057.

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judgment in respondent's favor in the sum of \$8,000, the city appeals.

The accident occurred in the night-time of November 7, 1903. The temporary sidewalk was constructed about three feet above the old walk and, as respondent claims, without any railing, guards, signal lights, warnings, or protection of any kind to prevent a pedestrian from falling off. Respondent lived in the neighborhood and was somewhat familiar with the street, but had not been along this part of the same since the temporary walk was built. Upon the evening in question she, in company with a son and daughter, was walking along the street. It being dark and rainy, they were walking close together, endeavoring to keep under an umbrella which the son carried. While passing the temporary walk, respondent stepped or fell therefrom to the old sidewalk below.

Respondent alleges in her complaint that she was, by said injury, made sick, sore, and lame, her nervous system shattered, certain bones broken and displaced, occasioned great pain, rendered incapable of attending to her household duties, and permanently injured; and states further that "the fall was of such nature as to produce unnatural and internal bleedings, as well as a concussion of her nervous system and organization, and of her spine. As an additional result, said injuries brought on a very high and dangerous condition of Bright's disease, and also affected plaintiff's sight and vision." Respondent was forty-three years old at the time of her injury. She was engaged in keeping roomers and boarders, and was a hard-working woman, earning, she claims, from sixty to ninety dollars per month.

It is urged by appellant that the evidence shows respondent to have been guilty of contributory negligence — that the changed condition of the sidewalk was, necessarily, noticeable by anyone walking thereon, and that she could have readily seen its condition and protected herself if she had used proper care. While there is some force in part of

this contention, we think that the evidence, as a whole, upon this point, presents a question of fact for the jury. Respondent was not aware of the changed and dangerous condition of the street and consequently was not called upon to exercise that precaution required where a pedestrian knows of, or has reason to suspect, danger. Had there been railings, signal lights, or other means to protect or warn her, a different question might be presented. As to the conflict of evidence concerning the conditions that obtained at the place of the accident, it must be held that the jury's verdict is conclusive where the conflict is substantial, and there is sufficient material, competent evidence to sustain the verdict.

Appellant contends that the verdict and judgment are excessive. We think there is merit in this contention. The evidence tended to show that respondent suffered from pain in various parts of the body, bruised back, impairment of use of legs, fracture of coccyx, nervous condition, and Bright's disease. There was a doctor's bill of about \$250. After falling, she immediately arose and walked on down town several blocks, did some shopping, and returned to her home, where she claims to have been confined, by the result of the accident, for about six weeks.

The principal injurious result relied upon appears to be that of Bright's disease, from which other troubles arose—respondent claiming it to be a consequence of her accident on the street, and appellant disputing this. The medical experts gave much evidence as to this condition. Respondent's family physician, placed upon the witness stand by her, testified that she was afflicted with that and other ailments prior to this accident. Other doctors, who had examined her since her fall, stated that she had Bright's disease in chronic form. Her physician made, among others, the following statement: "I think her nervous condition at this time is attributable to the fall, but the other con-

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ditions I don't think have any bearing on it at all." There was much evidence to sustain the opinion thus expressed.

Respondent is entitled to a substantial amount for pain and suffering, to an allowance for doctor's bill, and for loss of earning capacity and permanent injury, if any. As to how much her earning capacity has been impaired, it is impossible to say with any exactitude. It is impossible to determine how much of the unfortunate condition existing at the time of the trial was due to Bright's disease, and the other ailments with which she was afflicted prior to her fall on the sidewalk. That she was not a well woman is evident. That she is not entitled to recover for results of said prior ailments and for loss of earning capacity occasioned thereby is, of course, undeniable.

It is urged by respondent that there is nothing to show that the jury was influenced by passion or prejudice, and that, consequently, the verdict should not be disturbed. When a verdict of \$8,000 is returned upon such evidence as is found in this record, no further proof of passion or prejudice should be required. To be sure, the hesitancy with which this court will disturb a verdict is greater than that enjoined by law upon the trial judge. But, where it is clear that his action in upholding a verdict constitutes prejudicial error, this court will correct the same so far as it can. It is impossible to announce a definite rule applicable in all cases. But it must be borne in mind that courts are for the purpose of administering substantial justice in so far as the same can be approximated under the usual forms and procedure of law; and when, in a given case, it definitely appears that an act or omission of the jury, or any other factor in the trial, has thwarted this purpose and wrought an injustice, the trial court should apply a corrective. In this case, we feel that the evidence justifies no judgment greater than four thousand dollars.

The order of the court will be that, if the respondent,

within thirty days from the time of the filing of this opinion, will remit from the judgment all in excess of the sum of four thousand dollars and the costs taxed in the trial court, the judgment will stand affirmed for those sums; otherwise, the judgment will be reversed and a new trial granted. In case remission is made, neither party will recover costs in this court. If not so made, costs of this court will go to appellant.

Crow, FULLERTON, and RUDKIN, JJ., concur.

(No. 5657. Decided August 15, 1905.)

THE STATE OF WASHINGTON, *on the Relation of Dora Marsh Drasdo, Plaintiff*, v. A. W. FRATER, *Judge of the Superior Court for King County, et al.*,
Respondents.¹

MANDAMUS—WHEN LIES—ATTACKING JUDGMENT AFFIRMED ON APPEAL. After the final settlement of an estate, mandamus will not lie to compel the payment of a temporary allowance to a widow, pursuant to a former order requiring payment until final settlement, upon the theory that the order of final settlement was void, for various reasons, where, upon an appeal from such final order, the same had been affirmed, and all the questions raised determined.

Original application for a writ of mandamus, filed in the supreme court, April 24, 1905, to compel the enforcement of an order for an allowance to a widow. Writ denied.

Piles, Donworth, Howe & Farrell, for relator.

William Martin, for respondents.

PER CURIAM.—Original application for writ of mandate. On the 28th day of October, 1903, the estate of Paul Drasdo, deceased, was in process of administration in the superior court of King county. On that day, the court made an

¹Reported in 81 Pac. 1135.

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order directing the executors of said estate to pay to Dora Marsh Drasdo, widow of said deceased, the sum of \$250 on the 15th day of November, 1903, and the sum of \$250 on the 15th day of each and every month thereafter, until said estate was finally settled and determined, or until the further order of the court. This order was affirmed by this court, December 30, 1904. *In re Drasdo's Estate*, 36 Wash. 478, 78 Pac. 1022.

On the 4th day of January, 1905, after due notice, the superior court of King county made an order settling the final account of the executors, and directing a distribution of the residue of the estate. By this order, the executors were directed to pay to Dora Marsh Drasdo the sum of \$4,666.66, which was the full amount due to that date, under the prior order of October 28, 1903, exclusive of interest. On the 22d day of March, 1905, the relator, Dora Marsh Drasdo, petitioned the superior court of King county for an order directing the executors of said estate to pay to her the sum of \$5,630.25, being the balance due on said allowance at the rate of \$250 per month up to said March 20th, with interest, and requiring said executors to pay said allowance monthly until said estate was finally settled. On the 13th day of April, 1905, the court made an order on this application directing the executors to pay the relator the sum of \$4,666.66, fixed by the prior order, within three days, but denied all further relief.

The relator, by this application, seeks to compel the lower court to enforce the order making the original allowance, as affirmed by this court, after the 5th day of January, 1905, notwithstanding the decree of final distribution made and entered on the latter date. The main contention of the relator is, that the order of January 5, 1905, was made without jurisdiction, and is void for the reason that the estate was not ready for distribution at that time, on account of pending litigation, and for other reasons not necessary to be stated here. All these questions were disposed of by

the affirmance of the order of January 5, 1905, in this court.
Drasdo v. Jobst, ante p. 425, 81 Pac. 857.

The application is therefore denied.

(No. 5563. Decided August 16, 1905.)

NATIONAL GROCERY COMPANY, *Appellant*, v. T. H. CANN
et al., *Respondents*.¹

APPEAL—AMOUNT IN CONTROVERSY—DISMISSAL. An appeal from a judgment of the superior court, affirming on certiorari a justice's judgment for \$71.65 and costs, will be dismissed because the original amount in controversy did not exceed \$200.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 1, 1904, confirming a judgment of a justice of the peace, upon the final hearing of a writ of certiorari. Appeal dismissed.

Leopold M. Stern, for appellant.

John E. Ryan, for respondents.

PER CURIAM.—On April 22, 1904, respondent T. H. Cann, as justice of the peace in and for Seattle precinct, King county, Washington, entered a judgment against appellant for \$71.65 debt, and \$7.60 costs. Appellant, claiming said justice had acted without jurisdiction, and that said judgment was void, obtained from the superior court of King county a writ of certiorari to review the proceedings had before said justice. On the final hearing, said superior court entered an order confirming said judgment, and this appeal has been taken.

The original amount in controversy not exceeding the sum of two hundred dollars, respondent has moved to dismiss the appeal for want of jurisdiction in this court. Said motion will have to be sustained. See, *State ex rel. Gillette*

¹Reported in 81 Pac. 1054.

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v. Superior Court, 22 Wash. 496, 61 Pac. 158; *State ex rel. Fuller v. Superior Court*, 31 Wash. 96, 71 Pac. 722; *State ex rel. Corbin v. Superior Court*, 35 Wash. 201, 77 Pac. 33; *State ex rel. Bassett v. Freasure*, ante p. 198, 81 Pac. 688.

Appeal dismissed.

(No. 5597. Decided August 16, 1905.)

30 597
42 162

A. R. MACE *et al.*, Respondents, v. M. DUFFY *et al.*,
Appellants.¹

DESCENT AND DISTRIBUTION—PROOF OF HEIRSHIP—EVIDENCE—RECITALS IN DEED—COMPETENCY. Recitals in a deed, describing the grantors as heirs of a certain party, cannot be used as proof of heirship, in favor of the grantors or their successors.

SAME—JUDGMENT—ADMINISTRATION—FOREIGN DECREE OF DISTRIBUTION—EXTRA-TERRITORIAL FORCE. A final decree of distribution of a court of probate in Alaska, awarding estate there to parties found to be legal heirs of the deceased, is not competent evidence of heirship, as against a stranger to the record, with respect to real property in this state.

ESTOPPEL—STATEMENTS WITHDRAWN—RELIANCE UPON. An estoppel to dispute the heirship of certain grantors in a deed cannot be claimed by the grantees, where the statements relied upon as an estoppel were expressly withdrawn before the grantees purchased the property.

Appeal from a judgment of the superior court for Kitsap county, Denney, J., entered November 2, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to compel the conveyance of real estate. Reversed.

Ralph C. Bell, for appellants.

Smith & Cole, for respondents.

FULLERTON, J.—On September 20, 1897, one Samuel Harper, who was the owner, and in possession, of a tract of

¹Reported in 81 Pac. 1053.

land, situated in Kitsap county, conveyed the same, "in consideration of personal esteem and friendship," by quitclaim deed, to appellant M. Duffy. While the deed was on its face merely an ordinary deed of conveyance, without condition or reservation of any kind, it was shown at the trial—in fact it was not disputed—that the appellant took title to the property under an agreement to reconvey it to the grantor, should he return from Alaska, for which place he was then about to depart, or, in case he should not return, to his surviving heirs.

The grantor thereafter died, intestate, in the territory of Alaska, leaving estate therein, consisting of personal property. This estate was administered upon by a court in that territory having jurisdiction in probate, and the property of the estate distributed to three persons, one found by the court to be a brother, and the others, sisters, of the deceased. No administration of the estate of the deceased was had in this state. Later on the respondents in this action purchased, of the supposed brother and sisters, the land in question, and took deeds from them, in which it is recited that they are the brother and the sisters, respectively, of the deceased, and his sole heirs at law. The respondents thereupon entered into possession of the property, and demanded a deed of conveyance from the appellants. This conveyance the appellants refused to make, whereupon this action was begun to compel them to execute it. The trial court found for the respondents, and entered a judgment directing a conveyance to them, and from that judgment this appeal is taken.

Of the errors assigned, the only one meriting discussion is the contention that the proofs were insufficient to justify the finding that the respondents' grantors were the heirs at law of the grantor of M. Duffy. This contention we think is well taken. The evidence tendered to prove this fact was a certified copy of the decree of the probate court of Alaska awarding to these persons the Alaskan estate, and

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the deeds from them to the respondents, which contained, as we have stated, a recital to the effect that the grantors were heirs at law of the appellants' grantor. Obviously the recitals in the deeds were not competent evidence to prove the fact of heirship. Such recitals are no part of the deed, and are no more competent evidence of the fact stated than would be a letter from the grantors, or any other writing signed by them, containing the same statement. Such statements are but the *ex parte* declarations of the persons making them, which might be evidence against them as admissions in an action to which they were parties, but which can never be admissible as evidence in their favor.

Nor was the decree of distribution competent evidence of this fact in this case. Undoubtedly, the general notice the administrator is required to give in order to obtain a decree of distribution, renders the decree binding upon strangers, as to all property before the court and subject to administration and distribution by it, but this is its utmost effect. It has no effect as to property beyond the court's jurisdiction, and is not evidence against a stranger, when the action concerns property beyond its jurisdiction. *Costello v. Burke*, 63 Iowa 361, 19 N. W. 247; *Shores v. Hooper*, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308.

The respondents contend, however, that they purchased the claims of these persons to the property on the strength of a letter which the appellant M. Duffy wrote to one L. Edwin Dudley, expressing his belief that such persons were the heirs of Samuel Harper, and he contends that the appellants, for that reason, ought now to be estopped from asserting the contrary. But it appears, by the respondents' own evidence, that they made the purchase after they had interviewed the appellant M. Duffy, and had been told by him that he did not believe that these persons were such heirs. The appellants can claim an estoppel, if estoppel can be claimed at all, only on the theory that they had been misled by the appellants' statements in the letter; but this position

is scarcely tenable, since they were told, expressly, before they had made the purchase, that the appellant had changed his opinion as to fact recited in the letter.

These conclusions call for a reversal of the judgment, and would authorize an order directing that the action be dismissed. In view of the record, however, we have concluded not to direct a dismissal, but to reverse the case, and remand it for a new trial. Undoubtedly, competent evidence to prove title was within the reach of the respondents, and they were, perhaps, misled by the ruling of the court as to the competency of the evidence offered on that subject.

Reversed, and remanded for a new trial.

RUDKIN, CROW, and ROOT, JJ., concur.

(No. 5615. Decided August 18, 1905.)

CARRIE SWIFT, *Respondent*, v. JAMES B. SWIFT, *Appellant*.¹

APPEAL AND ERROR—RECORD—STATEMENT OF FACTS—FAILURE TO PROPOSE AMENDMENTS. Where no amendments are proposed to a statement of facts and the same is certified to contain all the material facts, it is sufficient to authorize a trial *de novo* on appeal, although depositions appear in the transcript which were not included in the statement.

SAME—REVIEW—FINDINGS. Findings in a divorce case in accordance with the weight of the evidence will not be disturbed on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 13, 1904, upon findings in favor of the plaintiff, granting a divorce. Affirmed.

James Hopkins, for appellant.

L. H. Prather, for respondent.

PER CURIAM.—The respondent brought this action against the appellant for a decree of divorce, alleging cruel treatment and personal indignities rendering life burdensome.

¹Reported in 81 Pac. 1052.

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A decree was rendered in her favor in the court below, and this appeal is taken therefrom. The respondent moves to dismiss the appeal, on the ground that the statement of facts fails to contain all of the evidence; and in support thereof, calls attention to the fact that certain depositions appear in the transcript, over the signature of the clerk, and not in the statement of facts. But it appears that a proposed statement of facts was served on the respondent, and that she neither filed any exception, nor proposed any amendments thereto, and that this statement was subsequently certified by the court to contain all of the material facts occurring in the cause, and not already a part of the record. This is sufficient to authorize this court to try the case *de novo*. It is from what appears in the statement, over the signature of the trial judge, that this court discovers the facts of the case, and it will not presume that depositions, which do not appear in the statement, although taken apparently for use in the case, were admitted and read in evidence, merely because the clerk has forwarded them to this court. The motion to dismiss is denied.

On the merits of the controversy, we think the court found with the weight of the evidence. The parties, at the time of their marriage, were well along in life, and while neither seems to have had much respect for the rights of the other, we think the husband was generally to blame for the difficulties that arose between them, and that his conduct was such as to justify the decree. We shall not, however, discuss the evidence in detail, as no useful purpose would be subserved thereby. The disposition of the property was equitable, and there is no cause for disturbing the decree in that regard.

Affirmed.

(No. 5591. Decided August 18, 1905.)

ROBERT BREEZE, *Appellant*, v. THE LONE PINE-SURPRISE
CONSOLIDATED MINING COMPANY *et al.*, *Respondents*.¹

ACTIONS—REAL PARTY IN INTEREST—VEXATIOUS SUIT—EQUITY—PLEADINGS—ANSWER IN EQUITY ALLEGING THAT PLAINTIFF IS NOT REAL PARTY IN INTEREST—FAILURE TO REPLY—DISMISSAL—STOCKHOLDER PURCHASING STOCK FOR PURPOSE OF SUIT. A suit by a stockholder, to set aside a transfer of mining property and appoint a receiver for a corporation on the ground of fraud on the part of the trustees and the illegality of a stockholders' meeting ratifying the sale, is properly dismissed for want of equity, where allegations of the answer of the defendants stand confessed to the effect that plaintiff is not the real party in interest, but acquired certain stock for the sum of \$20, after the stockholders' meeting complained of, for the purpose of bringing the suit in the interest of antagonistic parties, for whom plaintiff is acting as trustee.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 17, 1904, upon overruling a demurrer to an affirmative answer, dismissing an action brought by a stockholder to set aside a corporate sale of mining property. Affirmed.

W. T. Stoll, C. S. Voorhees, Reese H. Voorhees, and B. B. Adams, for appellant.

Post, Avery & Higgins and W. J. C. Wakefield, for respondents.

Root, J.—This action was brought by appellant to annul and set aside a transfer of mining property made, or assumed to have been made, by respondent, The Lone Pine-Surprise Consolidated Mining Company, a corporation, to the Pearl Consolidated Mining Company. The appointment of a receiver for the former company was also asked. Lack of power in, and fraud on the part of, the trustees, are alleged as grounds affording such relief. To the complaint, respondents made an answer, consisting of certain admissions,

¹Reported in 81 Pac. 1050.

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a general denial of all fraudulent acts and purposes, and an affirmative defense. The latter was couched in the following language:

"For further answer, and by way of defense, defendants allege:

"(1) That on or about October 3, 1903, a resolution was passed at a meeting duly called of the board of trustees of the Lone Pine company, defendant herein, to sell three of the four or more mining claims owned by said company, to wit, the Lone Pine claim, the Surprise claim, and the Pearl claim, to the defendant the Pearl company, in consideration of the Pearl company paying the indebtedness of the other company, amounting to about twenty-eight thousand dollars (\$28,000); that thereafter, and on or about November 9, 1903, a stockholders' meeting of said Lone Pine company was duly held, and a resolution at said meeting was passed, ratifying said sale and approving of the same, more than two-thirds of the stock of said Lone Pine company voting in favor thereof; that at said time, and as well at the times of the meetings thereafter held, referred to in the complaint, the shares of stock described in paragraph 3 in the complaint as belonging to this plaintiff, were owned by one W. F. Kane, and stood on the books of the company in his name; that he was duly notified of said stockholders' meetings and of the proceedings about to be taken at such meetings, and the reason why the same were called and held, and no objection or protest on his part was made to any of the resolutions or proceedings taken at such meetings.

"(2) That at the time of the stockholders' meeting, held on November 9, 1903, referred to in the preceding paragraph, and at the time of the other stockholders' meetings and meetings of the board of trustees, referred to therein and in the complaint, this plaintiff was the owner and holder of no stock whatsoever in either of the defendant corporations, and defendants further allege that he is not now in fact the owner of the shares of stock referred to in paragraph 3 of this complaint, although the same stands in his name, nor is he the real party in interest in this action, but that said stock was purchased by him for the sum of about twenty dollars (\$20) with full knowledge on the part of himself and those whom he represents of the action taken at a meet-

ing of the board of trustees on October 3, 1903, and at a stockholders' meeting on November 9, 1903, and the subsequent meetings referred to in this action and in the complaint, and that said stock was acquired for the sole purpose of bringing this action, not in the interest of the plaintiff, but that the plaintiff in this matter is the mere nominee and tool of others in the background, and that said other parties are G. B. Dennis and E. Dempsie and others interested in a corporation known as the Insurgent Company, and Isaac Anderson and N. W. Halsey & Company, part of whom are seeking to compel the defendant corporations to sell and transfer to them, for a nominal consideration, a part of the mining ground in controversy in this action, adjoining the Insurgent claim, owned by the Insurgent Company, and the rest of said parties are seeking to embarrass and annoy the defendant Theis for the purpose of bringing about the settlement of a certain lawsuit now pending, wherein said Theis is plaintiff and said Anderson and N. W. Halsey & Company and others are defendants, said action being brought to restrain the defendants from their attempt to deprive Theis of stock in the Spokane Falls Gas Light Company, a corporation of this county; that plaintiff is also the nominee and tool of Philip Creasor, plaintiff in another action of similar character, brought against these defendants, in bringing this action, and the same is being prosecuted in his interest because of the fact that he, himself, has not even a semblance of a cause of action, and for other inequitable reasons; that this action is not brought in good faith by the plaintiff, and he has no personal interest therein; that it is not brought for the benefit of any of the *bona fide* stockholders of either of the defendants, or for the benefit of either of the defendant corporations, but for the improper, illegitimate and inequitable purposes above mentioned."

To said affirmative defense, appellant interposed a general demurrer, which, by the trial court, was overruled. Appellant put in no reply, and announced no intention to stand upon his demurrer, whereupon, in due time, an order of default and judgment of dismissal was regularly entered. From this, an appeal is prosecuted.

It is questionable whether an appeal lies from such a de-

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termination of an action. *Pacific Supply Co. v. Brand*, 7 Wash. 357, 35 Pac. 72. But as this question is not discussed in the briefs, we will not pass upon it. We think the ruling of the trial court in overruling the demurrer was justified. This was an equitable proceeding. Under the demurrer, we must assume as correct the facts properly pleaded in the affirmative defense. Deeming these to be true, we are not impressed with the equities of appellant's cause. He does not come into court with a showing that calls for the intervention of the strong arm of equity in his behalf. If the equities of the controversy were with him, it was highly important that he should have replied to the affirmative defense in the answer, and disclosed all of the facts surrounding the questions involved. Before a court of equity grants such relief as appellant prays, it should be fully advised of all the facts, and be assured that equity and good conscience require the exercise of its powers.

In the case of *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157, the court employed the following language:

"The answer of the defendants was served on the plaintiffs more than two months ago. In that answer it is alleged with great distinctness, on the information and belief of the defendants, that Waterbury, the plaintiff, is not the real party in suit, but that the suit is prosecuted wholly at the instigation, and in the interest of the rival express companies, which are the real and actual plaintiffs in the controversy. This grave and serious allegation called for a denial on the part of the plaintiff in preparing his own affidavit for this motion, and not less for a denial by the other persons referred to, whose *ex parte* depositions have been read. There is no such denial. I have not the slightest reason to suppose that this omission is unintentional or inadvertent, and, coupling it with many other circumstances which need not be particularly noticed, I am compelled to take the fact, as alleged by the defendants, to be true, for all the purposes of this motion, and taking it to be true,

it is fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining another association or company, of which the nominal plaintiff may be a member. This has been repeatedly adjudged in the English chancery courts, and the principle is so plain as not to need further illustration."

In the case of *Camblos v. Philadelphia etc. R. Co.*, Fed. Cas., No. 2,331, p. 1089, the court said:

"It is charged and not denied that he acquired his stock 'on account and in the interest of the Adams Express Company, and solely with the view of giving himself a supposed status in court, to enable him to maintain the present suit ostensibly as a stockholder of the Philadelphia and Reading Railroad Company, but really as an agent of the Adams Express Company,' and 'that the expenses of the said suit are to be borne by the said company.' And these averments are corroborated by the fact that his bill is filed at the same time with and is an exact counterpart of the express company's bill. He does not, therefore, come into court with a *bona fide* complaint as a stockholder really seeking protection, but as the auxiliary of another party whose proceeding is adverse to his interest as a stockholder. It is not a question of his motives, but of the genuineness of the character in which he presents himself, and of the good faith of his appeal for summary relief. A court of equity is not the redresser of simulated wrongs, nor will it exert its strong arm to relieve a complainant in a position which he has voluntarily assumed, with a full knowledge of its perils."

Mr. Thompson, in Vol. 4, § 4568, of his Commentaries on the Law of Corporations, among other things, says:

"If, on the other hand, it is made to appear that the plaintiff is really not moving in his own behalf and taking the risk and responsibility of the action in good faith, but is put forward as a puppet by some concealed interest which has indemnified him against all risk,—a court of equity will not listen to his complaint."

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Green's Brice's *Ultra Vires* (2d ed.), p. 652, while holding that a person may purchase stock to prevent a corporation from doing unauthorized acts, nevertheless says: ". . . but the plaintiff on the record must be the person urging on the suit—he cannot be the mere nominee and tool of others in the background." At § 736, 2 Cook, Corporations, the author says:

"The law is well settled that if a stockholder institutes a suit in behalf of himself and other stockholders to enjoin or to bring to an accounting the corporate directors, and such suit is instituted, not to protect and benefit the stockholders' interest in the corporation, but to benefit some other corporation, the court will refuse to entertain the suit and will dismiss it. . . . But where the transfer is merely nominal, the transferee cannot bring a suit herein, since he has no pecuniary interests of his own to protect, and equity will not aid him."

The same author, in § 737, and notes thereto, calls attention to the rule of the Federal courts which prevents any person from maintaining such an action as this therein based on matters occurring before he became a stockholder in the corporation.

The court of appeals of Colorado, in the case of *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244, spoke as follows:

"If this litigation had been honestly instituted by a stockholder for the protection of his and other stockholders' rights, and was not so evidently a suit instigated by a rival company for its own interests, we should strive to be astute to discover some remedy for a very evident wrong. The far-reaching and flexible nature of equitable powers might, with proper proof, and under other circumstances, enable us to do justice as between the stockholders of the Grey Creek Company and Chappell, its officer and director. But we have no inclination to struggle for this result, because it is a well-settled principle that whenever it is made to appear that the suit was not begun in good faith by a shareholder for the protection of his rights, but was in reality originated

and prosecuted by another corporation for its own benefit, the court will consider what led the plaintiff to institute his suit, and, finding some other reason than a desire to protect stockholders' rights, will refuse to entertain the bill. . . . It seldom happens that shareholders, otherwise than for the protection of their own interests, come into courts of equity to seek redress for wrongs done the corporation of which they are members. But, wherever it is apparent that this has been done, the courts have never hesitated to send the plaintiff out of court, and refuse him relief."

Reference is here made to the opinion in the case of *Pitcher* against these same respondents, for a more complete statement of the facts out of which this suit arose, and for a further expression of our views upon some of the questions presented. That may be considered a companion case to this, and is decided at the same time.

The order and judgment of the superior court is affirmed.
CROW, RUDKIN, and FULLERTON, JJ., concur.

(No. 5590. Decided August 18, 1906.)

F. B. PITCHER, *Appellant*, v. THE LONE PINE-SURPRISE
CONSOLIDATED MINING COMPANY *et al.*, *Respondents*.¹

CORPORATIONS—STOCKHOLDERS—ACTION TO RESTRAIN SALE AS ULTRA VIRES—PURCHASE OF STOCK FOR PURPOSE OF SUIT—INTEREST OF PLAINTIFF—ACTIONS—EQUITY. Where a few dollars are invested in the purchase of stock in a corporation, after the sale of all its assets, for the purpose of bringing a suit against the trustees to set aside the sale, which has been ratified by over ninety per cent of the stockholders, the purchaser has no such interest as to enable him to maintain an action in equity.

SAME—SUIT BY MINORITY STOCKHOLDERS—SALE OF ALL ASSETS TO REORGANIZED CORPORATION—ULTRA VIRES—GOOD FAITH OF TRUSTEES—RATIFICATION. A sale of all the assets of a mining corporation to a reorganized company having the same trustees, for the purpose of

¹Reported in 81 Pac. 1047.

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raising money to pay a mortgage due to three of the trustees, who participated therein, and also for development work, is not *ultra vires* and void as to minority stockholders, where it appears that the corporation was justly indebted to the trustees, that its stock was nonassessable, and the new corporation was organized with assessable stock by the same trustees, and all stockholders were given an opportunity to exchange their stock on equal terms, the assessments to pay the indebtedness and raise money for development work; and where ninety-three per cent of the stockholders made the exchange and the sale was ratified at a stockholders' meeting, everything being done in good faith and for the best interest of the stockholders.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 30, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action brought by a stockholder to set aside a corporate sale of mining property. Affirmed.

W. T. Stoll, C. S. Voorhees, Reese H. Voorhees, and B. B. Adams, for appellant.

Post, Avery & Higgins and W. J. C. Wakefield, for respondents.

Root, J.—The Lone Pine-Surprise Consolidated Mining Company, which we shall refer to hereinafter as the Lone Pine company, owed \$25,000 to a certain bank. The latter declining to further carry said indebtedness, an arrangement was made by which three of the trustees and stockholders advanced \$22,500, and a mortgage was made by the company on their mining claims to a third party, to protect said trustees. Work was done, and additional obligations incurred and partly paid, until, on October 3, 1903, the indebtedness amounted to \$28,070.

At this time the trustees made arrangements with the Pearl Consolidated Mining Company, by which the Lone Pine company should sell and transfer to the Pearl company three of its mining claims, and the latter company should pay

off all the former's indebtedness. It was further provided that each stockholder in the Lone Pine company should receive in the Pearl company the same number of shares he had owned in the Lone Pine company. The Lone Pine company was capitalized at 3,500,000 shares, but only 3,126,000 had been issued. The Pearl company had a capitalization of 3,126,000 shares. The stock of the Lone Pine company was nonassessable; that of the Pearl company was assessable to the extent of five cents per share. The plan was to use one-half of this assessment to liquidate the indebtedness, and to employ the balance in developing and working the mining claims. The trustees in the Lone Pine company were Bibbins, Long, Schmitt, Robbins, Creasor, Ryan, and Jeldness. Those in the Pearl company were Bibbins, Long, Ryan, Schmitt, and Robbins. It will be thus seen that all of the trustees in the latter were like officers in the former company.

The mortgage aforesaid was given for the benefit of Robbins, Long, and Ryan, whose names appear in each of the foregoing lists. At the meeting of the Lone Pine company trustees where the resolution to make the sale was passed, there were present only five of the seven trustees, two of these being Robbins and Long. The action of the board of trustees was submitted to the annual meeting of the stockholders, held sometime afterwards. At this meeting, 2,328,536 shares were represented. Upon a resolution to approve the action of the board of trustees in making the sale and arrangement, hereinbefore set forth, all of this stock was voted in the affirmative, except 11,000 shares, owned by one person. Subsequently the holders of 2,916,350, out of 3,126,000 shares of the Lone Pine company, exchanged the same for stock in the Pearl company, pursuant to the arrangement mentioned.

Some months after this, appellant purchased 2,000 shares of the Lone Pine stock not represented at the said stockholders' meeting, and, a few days thereafter, commenced

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this action. It does not appear that appellant paid more than \$25 for said stock. He had not been a stockholder before this time. Prior to the commencement of this action there had been collected by the Pearl company, upon the stock assessments, something over \$20,000, to be applied, under the terms of the arrangement, one-half to the payment of debts, the other half to the development of the mining properties. This action is brought to have said sale set aside, to compel the Pearl company to account for minerals extracted, to have title quieted in the Lone Pine company, and for other equitable relief. From an order, judgment, and decree dismissing the action, appeal is taken to this court.

It is urged by appellant that the action of the Lone Pine company, by which the three mining claims were transferred to the new company, was absolutely void. This is claimed upon the ground that it thereby stripped itself of practically all its property, by a transaction in which three of its trustees were the principal beneficiaries; that the deal was made by said trustees with themselves, and that it would be against public policy to uphold it. It is not claimed that the indebtedness was improperly incurred, or in any way illegal or unjust; but it is urged that the pressure brought to bear by the trustees holding the mortgage occasioned the sale and arrangement made. The trial court found that the selling price was adequate, and that the entire transaction was had in good faith. Appellant contends that the adequacy of the consideration, and the *bona fides* of the trustees, can have nothing to do with the question; that there was no authority in law for the transaction, in view of the dual capacity occupied by the three trustees who were beneficiaries of the said mortgage.

We cannot agree with this contention. It is true that, where trustees, as such, enter into a contract, beneficial especially to themselves as individuals, and the matter is made the subject of judicial inquiry, such proceeding will

be closely scrutinized by the courts. The utmost good faith must be enjoined upon those who, as trustees, represent the interests of others. One in such a position of trust and responsibility may not make the rights of those he thus represents subservient to his own personal interests. He cannot be permitted to consummate a transaction detrimental to his company, in order to profit thereby himself. But the mere fact that he would be personally a beneficiary does not estop him, as a trustee, or the board of trustees of which he is a member, from doing such acts as the welfare of the corporation may require, and as good, honest, business judgment would dictate. The selling of these mines was not an act *ultra vires*. The articles of incorporation, among other things, recite: "The purposes for which this corporation is formed are to work, operate, buy, sell, lease, locate, acquire, procure, hold and deal in mines," etc. The trustees, therefore, had the power to sell these mines. If their conduct was tainted with fraud, actual or implied, the sale could be set aside, upon such a showing, by a party properly interested.

It is urged by respondents that appellant has no standing that permits him to question the sale of this property. He was not a stockholder at the time of the transactions complained of. He bought the stock he now has for the evident purpose of bringing this action. Care was exercised by him to acquire stock that was not voted at the stockholders' meeting where the action of the trustees, in making the sale, was ratified. He appears to have invested but a very few dollars. Some courts have held that an action of this character cannot be maintained where the complainant was not a stockholder at the time of the transactions complained of. As a rule, we think this correct, although there are doubtless some exceptions. We do not think anything is shown in this record bringing the case within any exception. When a man deliberately "buys a lawsuit," he is evidently intending, or looking for, trouble;

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and the burden is on him to show that his conduct is justifiable. "He who comes into equity must do so with clean hands."

Another maxim which suggests itself here is, "The law does not concern itself with trifles." When a man with only \$25 worth of stock in a given corporation commences a proceeding to enjoin the action of those owning over 93 per cent of the entire stock, worth many thousands of dollars, it should be countenanced only upon a very satisfactory showing. Such does not appear in this record. The Lone Pine company was deeply in debt. It could not pay its debts except by disposing of these mines—at least, no other method is suggested. To protect the stockholders, three of the trustees put their shoulders under the burden, and bore it for some time. Common honesty required that the corporation should see that these men were paid. An arrangement was made by which the burden of making this payment should be distributed *pro rata* upon those for whose benefit the obligation had been incurred. This was by selling the property to a newly organized company having assessable stock, which was to be exchanged *pro rata* for the Lone Pine stock. We can see nothing unfair, illegal, or inequitable in this method. It bears the impress of good business sense, impartiality, and fair dealing. That it was so considered by the stockholders, is evidenced by the fact that over ninety-three per cent of the stock was exchanged, according to the plan adopted. No other or better plan appears ever to have been suggested by appellant, or his predecessors in interest, or by any one else. One who buys stock in a corporation does so with the knowledge that its affairs must be dominated by a majority of the stockholders. The action of a majority of the board of trustees, acting legally, must be deemed to be the action of the entire board. And an assumed action of the board, whether legal or not, becomes binding upon the stockholders when they themselves, by a majority vote, ratify it—assuming, of

course, that it be a matter not *ultra vires* or fraudulent. This is true to the extent of disposing of all the property of the corporation, where necessity so requires. The court of appeals of New York in the case of *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, spoke as follows:

"In the application of the doctrine of *ultra vires*, it is to be borne in mind that it has two phases: one where the public is concerned; one where the question is between the corporate body and the stockholders in it, or between it and its stockholders, and third parties dealing with it and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts."

The case just quoted from is a very instructive one, having been thoroughly argued and carefully considered. See, also, *Kirwin v. Washington Match Co.*, 37 Wash. 285, 79 Pac. 928. For other authorities bearing upon the questions involved, attention is called to the opinion in the case of *Breeze* against these same respondents, decided at the same time with this.

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Opinion Per FULLERTON, J.

The record in this case discloses nothing that would justify a court in granting appellant the relief sought.

The judgment of the trial court is affirmed.

CROW, RUDKIN, and FULLERTON, JJ., concur.

(No. 5417. Decided August 18, 1905.)

C. V. EWELL *et al.*, Appellants, v. J. P. TURNEY,
*Respondent.*¹

BILLS AND NOTES—DEFENSES—AGREEMENT THAT NOTE SHOULD BECOME DUE ONLY UPON HAPPENING OF CONTINGENT EVENT—EVIDENCE—SUFFICIENCY—CLEAR PREPONDERANCE NECESSARY. The burden of proof is upon the defendant to establish by a clear preponderance of the evidence that, by a parol agreement, a promissory note was to become binding only upon the happening of a contingent event.

Appeal from a judgment of the superior court for Lincoln county, Martin, J., entered June 20, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action upon a promissory note. Reversed.

H. A. P. Myers, for appellants.

FULLERTON, J.—The appellants were the owners of certain mining property, and sold the same to the respondent, taking in payment therefor \$250 in cash, and two promissory notes, one a secured note for \$500, and the other an open note for \$250. The last named note was not paid, and this action was brought to recover thereon. To the complaint, which was in the usual form, the respondent answered, admitting the execution and delivery of the note, and the allegation that it had not been paid, but averred that it was "expressly understood and agreed, by and between the parties, that the note aforesaid should not become a note

¹Reported in 81 Pac. 1047.

collectible against said defendant, or have any value at all," until the mining property became a shipper of ore, and that such property had not as yet become such a shipper. The affirmative matter in the answer was put in issue by a reply. The case was first tried in 1899, before a jury, which returned a verdict for the plaintiffs, the appellants in this action. This verdict was set aside by the court, and a new trial granted. A second trial was had in 1901, before a jury, resulting in a like verdict, which was also set aside by the court. On December 12, 1903, it was tried by the court without a jury, and resulted in findings and a judgment in favor of the respondent. The case is in this court for trial *de novo* on appeal from the last mentioned judgment.

We think the judgment of the trial court is wrong. The burden was upon the respondent to establish the fact that the note was delivered on the condition set out in his answer, by a clear preponderance of the evidence, and, as we view the record, he has signally failed so to do. He testified that such was the condition on which the note was delivered, but this is denied by both of the respondents. Furthermore, the circumstances surrounding the transaction support the appellants, rather than the respondent. It was necessary to have certain writings to complete the transfer, and the parties went before a notary to have the papers prepared and executed, and that officer testifies that nothing was said in his presence concerning a conditional delivery of the last mentioned note. While it is competent for a maker of a note to show by parol that the note was to become a binding agreement only on the happening of a certain contingency, and that the contingency has not happened, yet his proofs must be reasonably certain to that end. In the case before us, there was not even a preponderance of the evidence in respondent's favor to the effect that there was a conditional delivery of the note sued upon.

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Opinion Per CROW, J.

The judgment is reversed, and the case remanded with instructions to enter a judgment in favor of the appellants, for the amount of the note set out in the complaint.

ROOT, CROW, and RUDKIN, JJ., concur.

(No. 5651. Decided August 21, 1905.)

JAMES FOWLER, *Respondent*, v. MARTIN HARRISON *et al.*,
Appellants.¹

WATERS—OBSTRUCTION OF NAVIGATION—FISH TRAPS—AUTHORITY FOR—CONSENT OF SECRETARY OF WAR—EVIDENCE. In an action for the wilful destruction of fish traps maintained by the plaintiff in a navigable stream, a certificate from the Secretary of War granting permission to maintain the traps is admissible in evidence to show plaintiff's good faith in endeavoring to comply with the law, especially where he also obtained a state license.

SAME—WILFUL DESTRUCTION OF FISH TRAPS—JUSTIFICATION—OBSTRUCTIONS—DAMAGES. The wilful and wanton destruction of fish traps in a navigable stream, by running into the same with a steamboat, is not justified by the fact that the traps were unlawfully maintained, where the channel of the river was not so obstructed as to impede navigation; and such acts render the wrongdoers liable in damages to the owner of the traps.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 1, 1904, upon the verdict of a jury in favor of the plaintiff, for damages for the destruction of fish traps, etc. Affirmed.

J. B. Bridges (*J. C. Cross*, of counsel), for appellants.

John C. Hogan, for respondent.

CROW, J.—Action by respondent, James Fowler, to recover damages from appellants, Martin Harrison and Ben Harrison, for the wilful and malicious destruction of certain fish nets, fish traps, and a dolphin, located in the Chehalis

¹Reported in 81 Pac. 1055.

river. The complaint alleged that respondent was authorized by the Secretary of War to maintain his fish trap and set-net locations; that he also held licenses from the state of Washington for the use of the same; and that the appellants, by the use of a certain steamer Fleetwood, owned and operated by them, wrongfully, wilfully and maliciously ran into, tore out, and destroyed said nets, traps, and dolphin, to his damage in the sum of \$605.

Appellants, in their answer, after denying said alleged acts of trespass, affirmatively alleged, that they were owners of, and operating, said steamer Fleetwood, upon the Chehalis river and Grays Harbor; that said river, a stream in which the tide ebbs and flows, is navigable for steam, sailing, and other craft, for a long distance above the location of the nets, traps, and dolphin mentioned in respondent's complaint; that said fish nets and other appliances were an unlawful obstruction in the channel of said stream; that they were so carelessly and negligently maintained by respondent as to interfere with navigation, and that, if they were injured or destroyed, as in the complaint alleged, such injury and destruction were not caused by any fault, wrongdoing, or negligence of appellants.

The reply admitted that said stream was navigable, but denied all other allegations of the answer. Upon a trial of these issues, the jury returned a verdict for respondent, for the full amount claimed, and judgment being entered on said verdict, this appeal has been taken.

The assignments of error urged by appellants are: (1) error in the admission of evidence; (2) error in entering judgment for respondent, because of insufficient evidence, and the recovery being excessive.

Appellants' principal objection to evidence, offered by respondent and admitted by the court, complains of a certain written authority, with plat attached, issued to said respondent, James Fowler, by the Honorable Secretary of

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War, under date of December 22, 1900, and containing the following language:

"And Whereas, Mr. James Fowler, of Aberdeen, Washington, has applied to the Secretary of War for permission to maintain fish traps in the Chehalis River, Washington, as shown on the attached drawing: Now, Therefore, This is to certify that the Secretary of War, upon the recommendation of the Chief of Engineers, hereby gives unto said James Fowler permission to maintain fish traps in the Chehalis River, at said place, as shown on said drawing, on the following conditions: (1) That the grantee herein shall maintain suitable lights on said fish traps at night; (2) that said fish traps shall be immediately removed by said grantee, at his own expense, whenever so directed by the Secretary of War."

The drawing attached to this written authority was a plat of that portion of the river immediately above, below, and at the points where respondent's fish traps and other appliances were located. Said drawing showed the course, width, and depths of the channel, the location of certain fish traps and piles, and also a dolphin, together with other facts, and apparently was the drawing upon which respondent's application had been based. Appellants contend that the language of said instrument, as above quoted, shows no authority for maintaining a dolphin, but mentions fish traps only; also, that the United States government could not give authority to fish with traps, but that such authority must come from the state of Washington; appellants' argument, as we understand it, being that, as this instrument was not sufficient in law to authorize respondent to maintain fish traps, and as it purported on its face to do nothing else, it was therefore not competent evidence for any purpose in this case.

We think there is no merit in this contention. Without discussing the scope of authority, if any, granted by said instrument, it at least shows respondent was making an honest effort to comply with the laws of the United States,

in maintaining said obstructions; that he had applied to the Secretary of War for authority to maintain the same, and, as a result of such application, received the certificate of authority above mentioned. There was no error in admitting the certificate and drawing in evidence. Moreover, respondent also secured licenses from the state of Washington authorizing him to fish with said traps and nets. After making a careful examination of the record, we are unable to find that the trial court committed any prejudicial error, either in admitting or rejecting evidence.

The verdict of the jury upon which the final judgment was entered in favor of respondent, was clearly warranted by the evidence. In fact we fail to see how any other verdict could have been reached. The proof was overwhelming and conclusive to the effect that appellants, time after time, on numerous occasions, deliberately, wantonly, and purposely ran their steamer into and destroyed said fish nets, fish traps, and said dolphin. This being true, respondent would be entitled to recover the damages sustained by him, even though it were conceded that he had not, in all respects, complied with the law in obtaining authority from the Secretary of War, or licenses from the state of Washington. Numerous steamboat men were introduced as witnesses, and testified that they had navigated this stream for many years, some with larger, and some with smaller, vessels than the Fleetwood, and that none of them ever had any trouble with respondent's fishing appliances. The evidence also clearly shows that the channel of the stream was not so obstructed by respondent as to impede its navigation, and also establishes the malicious, wilful, and wanton conduct of appellants. Were it to be conceded that respondent was not lawfully occupying the stream, and that his fishing appliances were somewhat of an obstruction, appellants would not be thereby excused for maliciously and wilfully destroying the same, nor could they do such acts and escape liability to respondent for damages resulting to him therefrom. Ap

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pellants also contend that the verdict and judgment were excessive, but we find them to be fully supported by the evidence. Appellants have been represented in the trial court, and also in this court, by learned and able counsel, and have had a fair and impartial trial. We find no error in the record.

The judgment is affirmed.

RUDKIN, FULLERTON, and ROOT, JJ., concur.

(No. 5695. Decided August 21, 1905.)

H. MILTON SHOWALTER *et al.*, Respondents, v. RASMUS SORENSEN *et al.*, Appellants.¹

VENDOR AND PURCHASER—FAILURE OF TITLE—AFTER-ACQUIRED TITLE OF VENDOR—CONTRACT OF PURCHASE—CONSTRUCTION—SPECIFIC PERFORMANCE. The after-acquired title of vendors under a land contract inures to the benefit of the vendees, where the contract was extended during the pendency of a suit in which vendors' title failed, notwithstanding stipulations in the contract giving the vendees a right to an immediate return of their money and notes in case of failure of the title; since such provision was inserted in the contract for the benefit of the vendees, and cannot be taken advantage of by the vendors, upon acquiring title, to defeat an action for specific performance.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 28, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, decreeing the specific performance of a contract to convey land. Affirmed.

Harris Baldwin, for appellants.

Poindexter & Kimball, for respondents.

Root, J.—On the first day of May, 1898, appellants Sorensen, husband and wife, agreed, by a written contract, to sell and convey to respondent H. Milton Showalter a cer-

¹Reported in 81 Pac. 1054.

tain parcel of land, situated in Spokane county. The contract contained, among others, the following provisions:

"First party herein agrees that if he fails to make good and sufficient title by warranty deed to second party of said lands promptly upon the final payment herein mentioned, or if his, the first party's, right to said lands being canceled or set aside by a court of competent jurisdiction, he will immediately refund to second party all sums of both principal and interest paid by second party on any and all notes given to secure the payments in this contract mentioned. And first party further agrees that if title to said lands are declared by a court of competent jurisdiction to vest in someone else the first party will return all unpaid notes of second party to said second party. . . . After the full payment of said purchase money, taxes, and interest, as aforesaid, time being the essence of this contract, the party of the first part agrees to execute or cause to be executed, to the party of the second part, a good and sufficient warranty deed for said described premises, to be delivered on the surrender of this duplicate contract."

Shortly after the execution of this contract, respondents moved upon the land and proceeded to make thereon valuable improvements. During this time the title to these premises was in litigation, which terminated in a decision reported in 33 Wash. 563, 74 Pac. 690 [*Humphries v. Sorenson*], from which it appears that appellants Sorensen, herein, did not have good title, but that the same was in a husband and wife named Loree. While this litigation was pending, the following stipulation was written upon the paper containing the original contract:

"Cheney, Wash., April 25th, 1902.

"To whom it may concern: It is mutually agreed between the above parties that this contract shall be extended until the suit now pending is settled.

"1st party, R. Sorensen.

"2d party, H. M. Showalter."

After the rendition of the decision above referred to, the Sorensens purchased the right and title of said Loree,

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together with a claim against respondents for the use of said premises during their occupancy thereof, as aforesaid. Thereupon, respondents tendered the balance of the contract price of purchase, and demanded a deed from the Sorensens. The latter refused to give any deed. They, however, offered to return respondents' promissory note, given for the unpaid portion of the purchase price, but refused to return the cash paid, holding the same as payment of the claim for rent which the Lorees had assigned to them. Sorensen and wife subsequently sold and conveyed the land to appellants Hay, whom the trial court found to have had actual knowledge of the rights and interests of these respondents. Said court also found this sale and conveyance to have been without consideration and fraudulent.

Findings and conclusions were made and entered favorable to respondents, and a decree was entered declaring the deed to Hay null and void, and directing Soren P. Hay and his wife, Anna Hay, to make, execute and deliver to said H. Milton Showalter a quitclaim deed to the said lands, and requiring said Sorensen and wife to execute and deliver to said H. Milton Showalter a good and sufficient warranty deed to said premises. From this decree an appeal is taken.

Appellants contend that respondents' remedy, under the contract, was confined to a return of the purchase money and notes, and that they could not have the benefit of the after-acquired title—that the facts do not sustain an action for specific performance. We are unable to agree with this contention. It finds support neither in law nor in equity. The paramount purpose of respondents, in entering into the contract, was to procure these premises, and a good and sufficient title thereto. The vendors should not now be heard to say that they will not comply with their contract because at the time of its execution they were unable to do so, the obstacle in the meantime having been removed. The right to have an immediate return of their notes and money, in case of failure of title, arises from a provision intended for

the benefit of vendees; but they are not confined to that remedy, after vendors acquire the outstanding title and render themselves capable of complying with their agreement to convey. Bal. Code, § 4538a; *Wooding v. Crain*, 10 Wash. 35, 38 Pac. 756; *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; *Peoples Sav. Bank v. Lewis*, 37 Wash. 344, 79 Pac. 932; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. 913.

The judgment of the superior court is affirmed.

CROW, FULLERTON, and RUDKIN, JJ., concur.

(No. 5658. Decided September 1, 1905.)

THE STATE OF WASHINGTON, *on the Relation of American
Freehold-Land Mortgage Company of London,
Limited, Respondent*, v. PETER MUTTY
*et al., Appellants.*¹

MUNICIPAL CORPORATIONS—BONDS—LEVY OF TAX TO PAY OUTSTANDING WARRANTS—MANDAMUS TO COMPEL INCREASED LEVY—OUTSTANDING TAXES AS ASSETS—PLEADING—SUFFICIENCY. The holder of municipal bonds is not entitled to a writ of mandate compelling the city council to assess and levy a tax to the full amount allowed by law, upon alleging that the tax levy decided upon is insufficient to pay the outstanding warrants and interest, without further showing that the outstanding unpaid taxes previously levied are inadequate or that the remedies for the collection thereof have been exhausted; since unpaid taxes are presumed available as assets, and the full levy is not mandatory when the payment may have been amply provided for.

SAME—DISCRETION OF COUNCIL. It is not incumbent upon the council to levy to the full amount allowed by law until the warrants are fully paid, irrespective of assets provided, since that would lead to taxation burdensome upon those who pay promptly, the remedy of the warrant holders being against the collecting officers.

SAME—PLEADING—DEMURRER—WARRANTS PRIMA FACIE VALID CLAIM. An application for a writ of mandate to compel a levy to provide payment of a municipal debt, shows a *prima facie* valid claim against the city by setting out the warrants, as against a demurrer.

¹Reported in 82 Pac. 118.

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Opinion Per HADLEY, J.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered March 27, 1905, in favor of the relator, granting a peremptory writ of mandate to compel the levy of a municipal tax, upon overruling a demurrer to the application and a motion to quash the alternative writ. Reversed.

A. W. Buddress, for appellants.

Robert P. Oldham, for the relator, to the point that as long as there were outstanding warrants unpaid, the city has no discretion and must levy to the full amount allowed by law, cited: *Riggs v. Johnson County*; 6 Wall. 166, 18 L. Ed. 768; *Sibley v. Mobile*, Fed. Cas. No. 12,829; *State ex rel. Munday v. Assessors of Rahway*, 43 N. J. L. 338; *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419.

HADLEY, J.—This is a mandamus proceeding to compel the levy of an additional tax in favor of the indebtedness fund of the city of Port Townsend. The superior court ordered an alternative writ of mandate, directed to the mayor and city councilmen of said city. The application and the alternative writ recite that, during the months of May, September, and November, 1898, certain warrants were issued by said city, drawn upon the indebtedness fund, that the relator is the present owner thereof, and that no part of the principal or interest of any of the warrants has been paid. It is averred that it was the duty of the mayor and councilmen to assess and levy a tax of six mills for said fund, for the year 1904; that relator, in due time, made a demand for such levy, but that the same was disregarded, and a levy of one mill was made; that, for several years prior to 1904, the mayor and councilmen have not levied a tax for said fund to the full amount allowed by law; and that, for the year 1903, the levy was one and fifty-

five hundredths mills. It is further alleged that the assessed valuation of the city for the year 1904 is \$930,946, and that the total sum of outstanding and unpaid warrants against said fund is about \$125,000; that a tax of one mill is insufficient to pay said outstanding warrants, or even the interest thereon; that an additional levy of five mills will not be sufficient to pay relator's warrants, because of those of earlier date outstanding against the fund.

The mayor and councilmen demurred to the alternative writ, and moved to quash it. The demurrer and motion were overruled, and the respondents to the writ having elected to stand upon their demurrer, and having refused to plead further, judgment was entered that a peremptory writ of mandate shall issue, requiring the levy of an additional tax of five mills for said fund, for the year 1904, and also that a levy of six mills shall be made each year thereafter until relator's warrants shall have been paid in full. The respondents to the writ have appealed from the judgment.

It is assigned that the court erred in overruling the demurrer and motion, for the reason that the writ does not state sufficient facts to entitle the relator, respondent here, to the writ. It is urged that the writ neither shows that the levy which was made is insufficient, nor that the appellants abused their discretion in the matter. The statute of 1897, which provided for the establishment of the indebtedness and current expense funds as separate and distinct funds, authorized the annual levy of a tax for the former fund not exceeding six mills on the dollar. Bal. Code, § 1792. The levy to the full amount of six mills annually is not mandatory, and there must be some discretion lodged with the appellants as to the amount necessary to be levied in any given year. Bal. Code, § 1794, provides that, in making the levy, the council shall take into consideration the amount of the outstanding indebtedness for the payment of which no provision is made by

law by the levy of a special tax, or otherwise than by a general tax.

It is manifest that the council should not only take into consideration the amount of outstanding and unpaid indebtedness, but should also consider it with reference to the means which have already been provided for payment, by way of cash on hand, and of previously levied and uncollected taxes. Such uncollected taxes constitute a part of the assets of the fund, which must be presumed to be available until it is made to appear that the levies therefor have proved to be ineffectual by reason of illegality, or that the full collecting powers provided by law have been exhausted without producing the revenue. Bal. Code, § 1796, requires that all moneys collected on and after the 1st day of February, 1898, from taxes of the year 1896 and previous years, together with penalty and interest thereon, shall be paid into the indebtedness fund. The above, together with the uncollected taxes under the levies for the indebtedness fund for the years since its establishment and cash on hand, make up the assets of the fund.

The alternative writ does not show that the assets, including those provided by the levy of 1904, are insufficient to pay the respondent's warrants. It is neither shown what amount of taxes has been collected, nor what amount remains uncollected. This court has held that it is a matter of such common knowledge in this state that all the taxes upon the assessment roll are never collected until years after the assessment, that the courts will take judicial knowledge thereof. *Mullen v. Sackett*, 14 Wash. 100, 44 Pac. 136. It has also been held that, for the purpose of determining the amount of indebtedness a municipality may incur within constitutional limitations, unpaid and delinquent taxes shall constitute a part of the cash assets, for the reason that the legal certainty of collection is not affected by the fact that the taxes are not paid when due. *State ex rel. Barton v. Hopkins*, 14 Wash. 59, 44 Pac. 134, 550;

Graham v. Spokane, 19 Wash. 447, 53 Pac. 714. It has been further held that the statute of limitations does not run against the foreclosure of tax liens, for the reason that, under our law, the tax is a lien which cannot be satisfied or removed until the tax is paid. *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045.

The alternative writ shows that previous levies have been made, but not the amount thereof. It must also be presumed, without a showing to the contrary, that appellants had discharged their duty and had made levies from year to year as the indebtedness fund required. We have seen that, under the decisions of this court, the unpaid taxes arising from such levies are not barred by the statute of limitations, and are to be treated as assets. Since the amount thereof is not shown by the writ, it is impossible to say that appellants have not amply provided by levies for the payment of respondent's warrants. In *Gay v. New Whatcom*, 26 Wash. 389, 67 Pac. 88, it was held that, when a municipality has each year made ample levy of taxes to meet the interest upon bonded indebtedness, it cannot be required by mandate to levy an additional special tax therefor, on the ground that the levies made have proved to be inadequate merely because the taxes have not all been collected. Inasmuch as it does not appear here that sufficient levies have not been made to meet the payment of respondent's warrants, we see no difference in principle between the case last cited and the one at bar.

Respondent contends that, without regard to the levies that have been made, it is the duty of the municipality to continue to levy each year to the full limit allowed by law, until the necessary cash to pay the warrants has been realized. We think not. Such a course might lead to unnecessary taxation, and might become particularly burdensome to those property holders who promptly pay their taxes. If the funds sought to be raised by previous levies are sufficient in amount, it cannot be presumed that those levies will be

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fruitless of the necessary results until it appears that the collecting department has exhausted its powers and duties in the premises, and has been unable thereby to secure the required amount of revenue. If sufficient levies have already been made, no duty rests upon the officers who make the levies to make additional ones until it appears that those already made have finally proved to be ineffectual of full results. *Duperier v. Police Jury*, 31 La. Ann. 709. In the above case the court said:

"The plaintiff obtained a judgment against the defendant in 1876. *Duperier v. Pol. Jury Iberia*, 28 Annual, 613. Under that judgment the defendant in that year levied a tax of three mills on each dollar's valuation of property on the roll of 1875 to pay it. A portion of this tax was collected, but not all, and therefore not enough to satisfy the judgment. The object of this mandamus is to compel the levy of another and additional tax on the roll of 1877 to pay this unsatisfied residue. We do not think she is entitled to it at present. This process of making a part of the tax-owners bear all the burdens of the government is not confined to Iberia parish. A tax of three mills was presumably sufficient, if collected, to discharge the debt. A part of those who owe taxes pay them. Others do not, and are not made to pay. A new and additional tax is laid to pay the residue of the debt. A part pay that—the same that paid the first—and the delinquents repeat their delinquency. Not enough is yet collected, and this tax levying goes on *ad infinitum* or until the repeated payments by the taxpayers extinguishes the debt that should have been borne proportionately by all the tax-owners. This is the root of half our woe. The plaintiff should have proceeded against the tax collector to compel him to collect the whole of the assessment and levy of the three-mill tax, which had been made for the express purpose of paying her judgment. The law provides ways and means for the collection of taxes, and until these are exhausted, the plaintiff or relator cannot rightly demand other process for the enforcement of her claim than that already given, and which the police jury have endeavored to effectuate by complying with the mandate of this court to levy a tax to pay it."

A similar state of facts was also considered by the same court in *Huey v. Police Jury*, 33 La. Ann. 1091. After showing that a sufficient tax had been levied to pay the debt, and that the relators should have proceeded against the collecting department, the court added:

"If they should pursue the remedy pointed out, and the provision made should prove inadequate for the satisfaction of their debts, then they may apply with confidence, under a proper showing, for the relief which we are compelled, under the state of facts shown, now to deny them."

The views of the supreme court of Louisiana, thus expressed, seem to us to be both sound and just, and in harmony with the decisions of this court heretofore announced. One dealing with a municipality must know that he may not always receive cash with the same promptness that he may expect it from a bank. The only means for raising cash is through taxation, and when the power of imposing the tax has been fully and promptly exercised, a creditor must await the action of the collection agencies provided by law. If the latter do not move with sufficient promptness, he may seek the aid of the courts as against them, and when their resources have been exhausted without providing sufficient funds to pay his debt, he may then be in position to demand an additional levy. Thus a creditor is not without final remedy. Ultimate payment, in some manner, of a valid debt must be at all times kept in view. Although delay in the collection of taxes may often make payment long deferred, yet any delay having in view final repudiation must not be entertained for a moment, and the law will always afford means to prevent it.

Another ground urged against the writ is that it does not appear that respondent has a valid claim against the city. We think this objection is not well taken. The warrants themselves, copies of which are set out, show at least a *prima facie* valid claim, and no more is necessary as

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against demurrer. But, for the reasons discussed, we think the writ is insufficient, and that the demurrer and motion to quash should have been sustained.

The judgment is therefore reversed, and the cause remanded, with instructions to sustain the demurrer and motion, but with leave to respondent to amend its application so as to state additional facts, if it shall so desire.

MOUNT, C. J., FULLERTON, and CROW, JJ., concur.

(No. 5641. Decided September 1, 1905.)

WILLIAM MILLER, *Appellant*, v. MORAN BROS. COMPANY,
Respondent.¹

39	631
40	226

MASTER AND SERVANT—SERVANT INJURED BY NEGLIGENCE OF INDEPENDENT CONTRACTOR—OBLIGATION TO FURNISH INDEPENDENT CONTRACTOR WITH APPLIANCES—SELECTION OF IMPROPER APPLIANCE BY SERVANTS OF INDEPENDENT CONTRACTOR. A master is not liable to its servant, injured by the negligence of employees of an independent subcontractor on part of the work in making use of unsafe appliances, where it appears that the agreement with the independent contractor did not require the master to furnish the appliances, and that suitable appliances were on the premises and no request was made therefor upon any of the master's officers or foremen, but the improper appliances used were selected by employees of the independent contractor without the knowledge of the master.

SAME—OBLIGATION TO INDEPENDENT CONTRACTOR. The duty of a master, who delegates part of the work to an independent contractor, to furnish him with suitable appliances would not render the master liable to his own employees for negligence of the independent contractor in respect to appliances used, although the master retained and exercised general supervision over the work, when the choice of methods was left entirely to the independent contractor.

SAME. There is no violation of a master's duty to furnish an independent contractor with suitable appliances for carrying on the work, by reason of the fact that none were at the tool house when sent for, where there was no request therefor made upon any of the master's officers or foremen.

¹Reported in 81 Pac. 1089.

SAME. The fact that a master had been furnishing appliances to an independent contractor would not render the master liable to its own employee for the negligence of the independent contractor in furnishing an unsafe device.

SAME—DUTY TO FURNISH SAFE PLACE—ASSUMPTION OF RISK—SERVANT WORKING UNDER HEAVY STEEL PLATE BEING PUT IN PLACE BY INDEPENDENT CONTRACTOR—USE OF UNSAFE APPLIANCE BY CONTRACTOR—KNOWLEDGE OF SERVANT—CONSTANTLY CHANGING DANGERS IN CONSTRUCTION OF SHIP. A carpenter employed by the defendant, a corporation engaged in building a battleship, assumes the risk of constantly changing dangers in the progress of the work, and cannot recover for injuries sustained on the theory that the defendant failed to provide a safe place, where it appears that plaintiff, whose work was constantly shifting from place to place, was working at the time of the accident directly under a heavy steel plate, which was being put in place by employees of an independent contractor, that plaintiff, after helping steady the plate, resumed his work beneath the same, and that the danger was open and as apparent and well known to the plaintiff as to the defendant, the place being rendered unsafe for the moment only, and by reason of the negligence of the employees of an independent contractor, which fact was unknown to the defendant.

SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT IN WORKING UNDER SUSPENDED STEEL PLATE IN CONSTRUCTION OF SHIP. An employee, a carpenter, engaged on work about the construction of a ship, is guilty of contributory negligence, where he, with full knowledge of the danger, voluntarily assumes a position underneath a steel plate weighing two thousand pounds, momentarily suspended while being put in place; no emergency or order in justification being shown.

SAME—KNOWLEDGE OF RELATION. An employee, injured through the negligence of employees of an independent contractor, cannot sustain an action against his employer by showing that he was not aware of the relation between the defendant and the independent contractor.

Appeal from a judgment of the superior court for King county, Morris, J., entered September 16, 1904, granting a nonsuit at the close of plaintiff's case, in an action for personal injuries sustained by an employee while working under a suspended steel plate being put in position by an independent contractor. Affirmed.

Benson, Hall & Higgins, for appellant.

Kerr & McCord, for respondent.

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Opinion Per Root, J.

Root, J.—Appellant was employed as a carpenter by respondent, a corporation, engaged in building the battleship “Nebraska” for the United States government. Respondent had in its employ over seven hundred men, some working by the hour, some by the day, and some by contract, on certain portions of the work, for fixed amounts. Appellant’s duties required him to go from place to place about said ship, putting in and changing stanchions or shores, used to support the vessel in position. One Kelly had a contract from respondent to place, upon the sides of the ship, certain steel plates. He was to be paid a gross sum for doing said work. He was given full power to hire and discharge men, and had the control and supervision of them while engaged in the work, they all being subject, however, to the general rules of the shipyard. The work was required to be satisfactory to respondent and the United States government, both of whom had superintendents about the premises. The appliances used by Kelly were furnished by respondent, although the written contract between them—which appears to have been the only contract governing them—is silent as to who should furnish the tools and appliances.

On the 16th day of November, 1903, while appellant was working in the vicinity of some of Kelly’s workmen, he was seriously injured by the falling of a steel plate, weighing about two thousand pounds. In raising this plate, a chain and tackle were fastened to an iron bar, placed lengthwise across a manhole, extending about nine inches on each side of said opening, which was eighteen inches in diameter. By chains extending from the tackle to the plate, the latter was raised from the floor to the side of the ship, where said plate was to be adjusted. While the plate was suspended in the air, appellant helped shove and “steady” it awhile, and then proceeded to do something about his own work under said suspended plate.

In attempting to get the plate into proper position on

the side of the vessel, one of the workmen, in using a wrench as a lever to push the plate along, let said wrench slip, which caused the plate to swing back on the chain, and, by its swinging motion and momentum, to occasion a slipping of the iron bar supporting the tackle. One end of the bar thereupon came through the opening, releasing the tackle, and permitting the plate to fall.

It appears by the evidence that an appliance, known as a grappling hook or as a clamp, could have been used instead of the iron bar; and, if properly adjusted, would have avoided this accident. Two of the workmen went to the tool house to get such an appliance but were told by the keeper in charge thereof that there was no such appliance there at that time. It appears by the evidence that there were probably such appliances about the yard. No request for such was made of any superintendent, foreman, or officer of respondent. The workmen selected the iron bar from certain of respondent's material found near by.

Appellant instituted this action against respondent to recover damages occasioned by reason of the injuries sustained as aforesaid. At the close of his case, a motion for nonsuit was sustained by the trial court. From the judgment of dismissal, this appeal is taken. It is claimed by appellant that it was respondent's duty to furnish a reasonably safe appliance to Kelly for raising these plates, and that, inasmuch as it did not do so, it must respond in damages to appellant for the injuries he sustained.

In the first place, the only contract shown to exist between respondent and Kelly does not place upon respondent any obligation to furnish any tools or appliances. In the next place, it does not appear that respondent, or any of its officers, superintendents, or foremen refused to furnish necessary and safe appliances. The unsafe appliance was not furnished by respondent. There is no evidence that respondent, or any of its agents, knew anything about Kelly's men having taken or used the iron bar in question. These

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men went upon their own motion and selected the bar in question. There is nothing to show that grappling hooks could not have been obtained, if requested of respondent's officers or foremen. It appears that there were doubtless some of these appliances on the premises. If there was any obligation on the part of respondent to furnish Kelly with appliances, it was a duty due to Kelly, and for any breach thereof it would be holden to Kelly, and not to appellant. That Kelly was an independent contractor is shown by the written contract in evidence. This relationship was not changed by the fact that general supervision was exercised over his work by respondent and the government, to both of whom the result of his work was required to be satisfactory. The choice of men, appliances, and methods was left to him, and for any negligence touching any of these matters, he, and not respondent, was answerable.

Even conceding it to have been the duty of respondent to furnish Kelly with appliances—and this is not shown by the evidence—this duty would be fulfilled by delivering suitable appliances to Kelly upon his request therefor. If there were such appliances provided in the yard where Kelly could secure them upon demand, it was a sufficient compliance with the duty. *Steeple v. Panel etc. Box Co.*, 33 Wash. 359, 74 Pac. 475. It appears that respondent, by some official, gave Kelly's workmen an order on the keeper of the tool house for one of these grappling hooks. None was there at the time. Instead of going to some foreman and asking as to where such an appliance could be found, these men went to a pile of iron near by, and selected the bar which was used. It was not the duty of respondent to keep watch of Kelly and deliver his appliances at the place of use.

As an independent contractor, Kelly owed his servants the duty of furnishing reasonably safe appliances. Toward others working in his vicinity, he owed the duty of ordinary care. Respondent had the right to presume that Kelly would

observe these obligations in the conduct of his work. If it were respondent's duty to furnish suitable appliances, it would have the right to presume that Kelly would request them from some one having authority, when they were needed, if they were not at hand. As the written contract did not require respondent to furnish appliances, the fact that respondent had been doing so would not render it liable in a given instance where the contractor or his servants selected an unsafe device. We can find nothing in the evidence showing any breach of duty on the part of respondent in the matter of furnishing, or neglecting to furnish, appliances. Such a breach must be shown before negligence is established. *Singleton v. Felton*, 101 Fed. 526.

A breach of respondent's duty to furnish appellant a safe place to work is suggested. That the master is under obligations to give the servant a reasonably safe place to work is, of course, a well established principle of law. But where the servant is in as good a position as the master to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, he cannot be heard to complain from injuries sustained by working therein. *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Tham v. Steeb Shipping Co.*, ante, p. 272, 81 Pac. 711.

In the case of *Wilson v. Northern Pac. R. Co.*, *supra*, this court, speaking by Mount, J., said:

"If defendants are liable at all, they are liable because of some neglect of duty owing from defendants to plaintiff. . . . They were not obliged to guaranty the safety of the place, but they were in duty bound to make a reasonable inspection. . . . His [the servant's] inspection was the inspection of a reasonably careful man. The foreman, no doubt, also inspected the ground in the same way for the same purpose, and saw the same as the plaintiff saw, and came to the same conclusion. . . . When the danger is not known, and not suspected, and where there

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Opinion Per Root, J.

are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact. When reasonably careful men conduct their business in a reasonably careful manner, there is no negligence."

In *Anderson v. Inland Tel. etc. Co.*, *supra*, this court speaking through Dunbar, J., said: ". . . if the employee does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding;" and the following quotations were made with approval: "Where the danger is alike open to the observation of all, both master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business,"—taken from *Griffin v. Ohio etc. R. Co.*, 124 Ind. 326, 24 N. E. 888. "A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the danger incident to its use, as the master, or if in the exercise of due care, he ought to have such knowledge. . . .,"—quoted from Wood, Master & Servant, § 366. "Knowledge on the part of the employer, and ignorance on the part of the employee, are of the essence of the action . . .,"—quoted from Beach, Contributory Negligence, § 346.

In the case of *Tham v. Steeb Shipping Co.*, *supra*, this court upheld an instruction of the trial court given in the following language:

"If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."

In the case before us, there was no occasion for respondent's supposing that Kelly would be using the iron bar mentioned. Respondent was concerned with the results of

Kelly's work, but not with the details of its performance. It was not required to know that he was using an unsafe appliance at that particular time, and there is no evidence that any of its officers or agents did know. Appellant was at the place. So far as the evidence shows, he was in a better position to know of the character of this appliance and its dangers than any officer or agent of respondent. Appellant's work was constantly being changed from place to place in removing and adjusting the shores about the ship. This particular place was rendered unsafe only at the moment when they began to elevate this heavy plate. The entire situation may have been thoroughly inspected and found safe a minute before, so far as the evidence shows. Respondent was under no obligation to have an officer constantly follow appellant around to protect him from situations made dangerous by occurrences unusual and unexpected by either master or servant. It was daylight, and appellant could have seen this iron bar as well as any foreman. Seeing it, he would know that there was more or less danger in its use. The very nature of the work of building a ship necessitates constant changes. A place perfectly safe one minute may become extremely dangerous the next by the ordinary and necessary operation of the work, and without fault on the part of any one. A servant working in the capacity of this appellant knows all this, and must be held to be, to a certain extent, his own inspector. He cannot complain because the master, with less opportunity than he, has failed in a given instance to detect or anticipate an unexpected occurrence. *Weideman v. Tacoma R. & Motor Co.*, 7 Wash. 517, 35 Pac. 414; *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. There is no evidence to show that respondent knew, or had any reason to suspect, that appellant's working place had been made dangerous by Kelly, or any one. It therefore follows that appellant's action cannot be sustained on that ground.

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Opinion Per Root, J.

The defenses of contributory negligence and assumed risk are interposed by respondent, and are not without support in the evidence. Appellant offers no good reason for standing under the suspended steel plate. He knew its tendency to swing—as he admits that he helped to “steady” it. It would seem that common prudence ought to suggest to any person of ordinary intelligence the propriety of “standing from under” while a two-thousand pound weight was swinging over his head in the air. Where a heavy steel plate is being handled with chains and other metallic appliances, in the manner open and apparent as was this, the risk of danger from standing under it would be evident to any one. To be sure, there was no certainty of injury, perhaps no probability; but there was an obvious possibility, and the serious character of the danger, in case the heavy plate should fall, would be apparent to any person of ordinary intelligence. It is inconceivable that any person of ordinary prudence would have stood under such a swinging mass of steel. No emergency, direct orders, or unusual occurrence is shown in justification of appellant’s presence in a place of such danger.

It is urged by appellant that he did not know that Kelly was an independent contractor, and that he had a right to suppose that Kelly’s men were servants of respondent, and that it was respondent’s duty to furnish them with safe appliances. We are shown no facts or law making it the duty of respondent to inform appellant that Kelly was such contractor. None such occur to us. Neither has our attention been called to any authority giving a servant a right of action for a breach of duty on the part of the master toward an independent contractor and his men, said servant not working for, or under the direction of, said contractor.

Perceiving no error in the ruling of the trial court, the judgment is affirmed.

MOUNT, C. J., RUDKIN, CROW, and HADLEY, JJ., concur.

(No. 5626. Decided September 1, 1905.)

MICHAEL BRENNAN *et al.*, Respondents, v. THE CITY OF SEATTLE, Appellant.¹

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—WHEN PROPERLY GRANTED ALTHOUGH THE NEW EVIDENCE IS PARTLY CUMULATIVE. It is not an abuse of discretion to grant a new trial for newly discovered evidence, after a verdict for the defendant, in an action for personal injuries sustained in a fall upon a wooden sidewalk, where six or eight witnesses had testified for the defendant to the effect that a cement walk had been laid and completed at the place in question at the time of the accident, and the newly discovered evidence was that of a city claim agent and of a city inspector, who investigated the case for the city and were not called as witnesses, and who had admitted, and would testify, that at the time of their investigation of the case the cement walk had not been completed.

SAME—DILIGENCE. In such a case lack of diligence is not shown by affidavits to the effect that the claim agent called upon the plaintiffs shortly after the accident and was directed to the place, where the affidavits are conflicting, and plaintiffs did not see him at the place or have any knowledge of the inspector.

SAME—CUMULATIVE EVIDENCE. Such testimony is not purely cumulative, since it establishes a condition at a subsequent date corroborative of the evidence of the plaintiffs as to the condition at the time of the accident.

SAME—DISCRETION OF THE COURT. The granting of a new trial should not be reversed as an abuse of discretion, if the ends of justice are subserved, although not warranted under a strict construction of the procedure according to the letter of the law.

SAME—PROCURING AFFIDAVITS OF NEW WITNESSES—EVIDENCE AGAINST INTEREST. Upon an application for a new trial on account of newly discovered evidence, it is a sufficient excuse for failure to produce the affidavits of the witnesses that they were in the employ of the adverse party and their evidence would be against the interest of their employer.

Appeal from an order of the superior court for King county, Griffin, J., entered December 13, 1904, granting a new trial for newly discovered evidence, after a trial and the verdict of a jury in favor of the defendant, in an

¹Reported in 81 Pac. 1092.

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Citations of Counsel.

action for personal injuries sustained by a pedestrian in a fall upon a sidewalk. Affirmed.

Wm. Parmerlee (*Scott Calhoun*, of counsel), for appellant. It was necessary to produce the affidavits of the newly discovered witnesses. 14 Ency. Plead. & Prac., 825-827; *Caldwell v. Dickson*, 29 Mo. 227; *Eddy, Fenner & Co. v. Caldwell*, 7 Minn. 225; *Jones v. State*, 35 Fla. 289, 17 South. 284; *State v. Hall*, 97 Iowa 400, 66 N. W. 725. Evidence is not newly discovered if known to a client although not known to the attorney. *Isaacs v. People*, 118 Ill. 538, 8 N. E. 821; *Pace v. State*, 63 Ga. 159; *Russell v. Oliver*, 78 Tex. 11, 14 S. W. 264. The evidence was cumulative. *O'Toole v. Faulkner*, 34 Wash. 371, 75 Pac. 975; *Fox v. Reynolds*, 24 Ind. 46; *Lefever v. Johnson*, 79 Ind. 554; *State v. Hendrix*, 45 La. Ann. 500, 12 South. 621; *Nininger v. Knox*, 8 Minn. 140; *Shute v. Jones*, 24 N. Y. Supp. 637; *Benson v. Hamilton*, 34 Wash. 201, 75 Pac. 805; *State v. Underwood*, 35 Wash. 558, 77 Pac. 863.

G. M. Emory, for respondents. Every presumption is in favor of sustaining the discretion of the court in granting a new trial. 14 Ency. Plead. & Prac., 979-981; *Gruss v. Robertson* (Cal.), 37 Pac. 772. Technical rules of practice should be brushed aside. *Jones v. Evans*, 28 Wis. 168; *Ewing v. Price*, 3 J. J. Marsh. (Ky.) 520. The proof of a distinct fact tending to establish the same result is not cumulative. 8 Am. & Eng. Ency. Law (2d ed.), 462; *Parker v. Hardy*, 24 Pick. 246; *Howland v. Reeves*, 25 Mo. App. 458; *Bigelow v. Sickles*, 75 Wis. 427, 44 N. W. 761; *Able v. Frazier*, 43 Iowa 175; 14 Ency. Plead. & Prac., 816-819; *Oakley v. Sears*, 1 Abb. Prac. (N. S.) 368; *Wilson v. Plank*, 41 Wis. 94; *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1107; *Grogan v. Chesapeake etc. R. Co.*, 39 W. Va. 415, 19 S. E. 563; *Cole v. Fall Brook Coal Co.*, 16 N. Y. Supp. 789; *Leavy v.*

Roberts, 8 Abb. Prac. 310; *German v. Maquoketa Sav. Bank*, 38 Iowa 368; *St. John's Ex'rs v. Alderson*, 32 Grat. (Va.) 140; *Wynne v. Newman's Adm'r*, 75 Va. 811; *Bogges v. Read*, 83 Iowa 548, 50 N. W. 43; *Layman v. Minneapolis etc. R. Co.*, 66 Minn. 452, 69 N. W. 329; *Waller v. Graves*, 20 Conn. 306. Cumulative evidence alone is sufficient if manifest injustice will be done unless the new trial is granted. 14 Ency. Plead. & Prac., 820; *Mitchell v. Bass*, 26 Tex. 372; *Wolf v. Mahan*, 57 Tex. 171; *Wilcox Silver Plate Co. v. Barclay*, 48 Hun 54; *Bulkin v. Ehret*, 29 Abb. New Cas. 62, 20 N. Y. Supp. 731.

Root, J.—Respondents instituted this action to recover from the city of Seattle damages resulting from an injury to Mrs. Brennan, incurred by a fall. They allege that she was walking on a public street near the intersection of Eleventh avenue and Marion street; that the city had a board sidewalk (theretofore existing) torn up, and that certain nails or spikes were left projecting from the curbing in such a manner as to catch the garments of said respondent, and to trip and cause her to fall, while passing along with a baby in her arms. One shoulder was seriously injured, and she was otherwise injured to some extent. Her testimony, and that of her husband, sustained the foregoing statement of the facts. The appellant introduced the evidence of six or eight witnesses to the effect that a cement walk had already been laid at the place where respondents claim the accident to have occurred, and that Mrs. Brennan could not have fallen at the place indicated by respondents' testimony. It appears that the defense was made for the city by the contractor who had charge of making the improvements where the accident was alleged to have occurred.

The jury returned a general verdict favorable to the city, and a special finding to the effect that said respondent did not fall at the place alleged by respondents. The verdict

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was so returned June 20, 1904. On July 16, 1904, respondents filed a motion for an order extending the time within which a motion for a new trial might be interposed. The motion was granted. A motion for a new trial was then filed, based upon the ground of newly discovered evidence. Said motion was supported by the affidavit of respondents' attorney. In said affidavit he stated that, on the 16th day of July, 1904, one J. H. Dennis, who was a claim agent in the employ of the city, had stated to him that he (Dennis), in the discharge of his duties as such agent, had made an examination of the premises some three or four days after the accident, and that the cement walk was not at that time laid, but that the conditions were as testified to by respondents; that a certain inspector had accompanied Dennis and observed the same as he. The attorney's affidavit further stated that these facts were unknown to him, or to respondents, or either of them, and that they could not have been ascertained before the trial by the exercise of reasonable diligence. The affidavit further stated that both of these men would be present and give such evidence, if a new trial should be had. In answer to this affidavit, appellant filed that of said Dennis. This affidavit neither affirmed nor denied that the affiant and said inspector had made the examination referred to in the affidavit of respondents' attorney; but stated that affiant had called at respondents' home, inquired as to the place of the accident, told respondents that he was going there to examine the premises and started away in that direction. The affidavit also stated that affiant's testimony would be merely cumulative. Respondents did not produce or file affidavits of either Dennis or the inspector. Upon this showing, the trial court made and entered an order granting a new trial, solely upon the ground of newly discovered evidence. From this order, an appeal is taken to this court by the city.

Tested by a rigid and technical application of the rules

ordinarily invoked in the decision of a motion for a new trial upon the ground of newly discovered evidence, this showing might be deemed insufficient. But viewed liberally, in the light of the peculiar circumstances shown to exist, we think the action of the trial court justifiable. Ordinarily this court will not disturb the ruling of the trial court in granting a new trial upon the ground of newly discovered evidence, or upon any ground involving questions of fact, unless it appears very clearly to have been an abuse of discretion. We do not think it so appears here. It is urged that no affidavits of the witnesses who are relied upon to furnish the newly discovered evidence are presented. To this it may be answered that the affidavit of one of these men is before the court, it having been interposed by appellant as an answer to the affidavit of respondents' attorney. This affidavit is, to a certain extent, an admission of material portions of said affidavit of respondents' attorney. But, aside from this, we think the fact that these persons were both employees of the city is, in itself, ample excuse for not presenting their affidavits. To ask them to give affidavits setting forth the matters which it is claimed they could testify to, would be to request them to place themselves in a very embarrassing position. It would be but natural for them to decline to furnish affidavits to be used in court against their employer, the city. We think respondents were not required to produce affidavits from these men.

It is urged that the alleged newly discovered evidence was, as a matter of fact, not newly discovered, but known to respondents before the trial. The affidavits are to a certain extent conflicting as to this. Respondents claim they did not know of this evidence. Dennis, the claim agent, set forth that he called at respondents' home a few days after the accident, and, upon being told where they claimed the accident occurred, told them he was going there to examine the premises, and started off in that direction.

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It does not appear that they saw him there or knew that he did go there. It appears affirmatively that respondents' attorney did not know anything about this incident. It is not claimed that respondents at that time knew anything about the inspector who was with Dennis when he examined the premises, or had any knowledge or intimation that said inspector was to, or that he ever did, examine the locality of the accident. Consequently, the evidence of this inspector would be clearly newly discovered.

Stress is laid upon the contention that the newly discovered evidence would be merely cumulative. We do not regard it so. While in a general way it is such, as bearing upon the condition of the sidewalk at the time of the accident, yet it bears upon that question in a different way. It tends to establish a condition at a subsequent date, corroborative of the evidence of respondents as to what the condition was at the time of the accident. But even if it were to be deemed simply cumulative, this fact would not conclusively determine the motion against respondents. It is, of course, a general rule that new trials are not to be granted upon the ground of newly discovered evidence which is merely cumulative. But this rule is not without exceptions. And like other rules of law and procedure, it is not to be invoked in a given case where its application would tend to defeat the ultimate purpose for which all such rules are ordained, the accomplishment of substantial justice.

The purpose of the trial of an issue of fact by a judge or jury is to ascertain the truth. When the truth is elicited and the facts established, then the court may apply the law in such a manner as to mete out justice. But, if anything has prevented the ascertainment of the truth as to the facts of a case, in arriving at and announcing a finding or verdict, it necessarily follows that a judgment thereupon cannot be just or right. Courts should not permit results of this kind to stand if the law furnishes any remedy for the wrong.

To enforce a rule of law or procedure according to the letter, and thereby stifle the spirit, is a perversion of justice that should not be tolerated in our jurisprudence. "The letter killeth, but the spirit giveth life," wrote a great interpreter centuries ago. The observation is often especially pertinent to human law. To a certain extent, rules of procedure are indispensable to the orderly despatch of judicial business; but these rules were intended for, and must be applied as, the servants, rather than the masters, of a court. An eminent English judge once said that nothing but an imperative mandate of an Act of Parliament justified a court in applying a rule where its effect would manifestly be to defeat the ends of justice. There may be times when the law leaves no discretion to the court; but, under any other circumstances, no court is justified in applying a rule or principle the evident effect of which would be to work an injustice and wrong.

In determining what is an injustice or wrong, regard must, of course, be had not merely to the interests of the parties in a given suit, but also to the rights and welfare of the people of the state as a whole. Injury and hardship do not always, or necessarily, constitute injustice or wrong. The objections urged by appellant are technical in their nature. They go merely to the question of strict legal right, rather than to the justice and righteousness of the cause. To have sustained them would have been to disregard the merits of the cause and the appearances of fair dealing. Not only should courts endeavor to have their proceedings fair and impartial, and their judgments comporting with justice and the right of the matter, but they should carefully avoid any course of action having the appearance of anything else. It is important that the public should feel that its courts are disposed to employ their machinery with a determination to mete out justice, as fully as possible, disregarding technicalities and matters

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of form where their application would defeat the very ends for which courts are instituted.

In the light of these observations, let us look at the peculiar facts of this case. The two respondents testify to a certain material fact. They are contradicted by six or eight witnesses for appellant. The jury does not find the preponderance of the evidence to be with respondents. A verdict is returned for appellant. Afterwards, it is ascertained that two employees of appellant had made an examination of the premises in question shortly after the accident, and found the condition thereof to be just as respondents had testified. These employees were not called as witnesses by the city. This fact would indicate that they could not have given testimony favorable to it. Had they been called as witnesses by respondents, and testified as the affidavits allege, it is not certain that the verdict would have been different; but it is quite possible that it would have been. The fact that one of these men was the claim agent of the city, charged with the especial duty of investigating such accidents, would certainly have rendered his evidence very important and especially weighty when antagonistic to the contention of the city, his employer. The testimony of the other man, being an inspector in the service of the city, would likewise have challenged the careful consideration of the jury. The showing was to the effect that both of these men would testify, in case of a new trial, so as to establish the material fact in accordance with respondents' contention. This evidence, being against interest, must be regarded as likely to have much weight with the jury. It not having been produced on the first trial, it is evident that the result was there obtained in the absence of very important material evidence. That evidence being discovered shortly after the trial, and its production guaranteed in case of a new trial, it would seem that consideration of fair dealing and justice very naturally and properly actuated the trial judge in granting the new

trial. To have done otherwise, would have permitted technicalities to override considerations of justice and right. Respondent Margaret Brennan was seriously injured. If these injuries occurred* as she and her husband testified, they were certainly entitled to a recovery. While the newly discovered evidence might not change the finding of the jury on this question, it might do so; and it is certain that the final result, with such evidence in the case, would be more satisfactory to fair-minded, justice-loving people than would a trial with such important evidence omitted.

Not finding any abuse of discretion in the action of the trial court, the order appealed from is affirmed.

MOUNT, C. J., CROW, RUDKIN, and HADLEY, JJ., concur.

(No. 5053. Decided September 5, 1905.)

THE STATE OF WASHINGTON, *on the Relation of Tacoma Industrial Company, Plaintiff*, v. WHITE RIVER POWER COMPANY *et al.*, Respondents.¹

EMINENT DOMAIN—PUBLIC USE—PUBLIC SERVICE CORPORATIONS—NO CONDEMNATION BY ELECTRIC LIGHT AND POWER COMPANY ORGANIZED FOR COMMERCIAL PURPOSES—PUBLIC NECESSITY AND CONTROL. The right of eminent domain cannot be exercised in favor of an electric light and power corporation organized for the purpose of diverting water for power purposes for the generation of electricity to be sold commercially to manufactories, railways, and cities, in the absence of statutory regulation and guarantees of the public use and enjoyment of the property; since the same is not a public service corporation, and the use not a public use, and public necessity does not require it.²

SAME—CONSTITUTIONAL AUTHORITY FOR USING WATERS FOR MANUFACTURING PURPOSES. Const., art. 21, declaring the use of waters for manufacturing purposes a public use, is in conflict with the due

¹Reported in 82 Pac. 150.

²NOTE. For a late case in point, see, *Brown v. Gerald* (Me.), 61 Atl. 785. REP.

process clause of the Federal Constitution in so far as it may be construed to extend the right of eminent domain to take private property for uses essentially private.

Certiorari to review an order of the superior court for Pierce county, Huston, J., entered in favor of the petitioner February 19, 1904, upon declaring a public use, in a proceeding to condemn land. Reversed.

Carr & Preston, John A. Shackelford, Walker & Munn, and Stanton Warburton, for relator (defendant below).

(1) The use is not a public one, because: First, no obligation rests upon the power company to serve the public independently of its own will. *Healy Lum. Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. 538; *In re Eureka Basin etc. Co.*, 96 N. Y. 42; *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. 179, 98 Am. St. 818; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894; *Jordan v. Woodward*, 40 Me. 317; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855; *Eldridge v. Smith*, 34 Vt. 484; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Varner v. Martin*, 21 W. Va. 534; *Plecker v. Rhodes*, 30 Grat. 795; *Attorney General v. Eau Claire*, 37 Wis. 400; *McCulley v. Cunningham*, 96 Ala. 583, 11 South. 694. Second, at least part of its purposes are private uses. *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *In re Rhode Island etc. R. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; *Avery v. Vermont Elec. Co.*, and *Eldridge v. Smith*, *supra*. And this is fatal to the proceeding. *McCulley v. Cunningham*, *supra*; *Kaukauna Water Power Co. v. Green Bay etc. Canal Co.*, 142 U. S. 254, 12 Sup. Ct. 73, 35 L. Ed. 1004; *Green Bay etc. Canal Co. v. Patten Paper Co.*, 172 U. S. 58, 19 Sup. Ct. 97, 43 L. Ed. 364; *Attorney General v. Eau Claire*, *supra*; *State v. Eau Claire*, 40 Wis. 533; *In re Barre Water Co.*, 62 Vt. 27,

20 Atl. 109, 9 L. R. A. 195; 1 Lewis, Eminent Domain (2d ed.), § 206. Third, Const., art. 21, providing that the use of waters for manufacturing purposes shall be deemed a public use, was not intended to, and cannot, make inherently private uses public uses. *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; 1 Lewis, Eminent Domain (2d ed.), §§ 202, 206a; *Denver etc. Coal Co. v. Union Pac. R. Co.*, 34 Fed. 386. Neither is the generation of electricity "manufacturing" in the ordinary sense. *Frederick Elec. L. etc. Co. v. Frederick*, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; *Commonwealth v. Northern Elec. L. etc. Co.*, 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107; *Commonwealth v. Edison Elec. L. Co.*, 145 Pa. St. 131, 22 Atl. 841, 845, 27 Am. St. 683; *Commonwealth v. Edison Elec. L. etc. Co.*, 170 Pa. St. 231, 32 Atl. 419; *Commonwealth v. Brush Elec. L. Co.*, 145 Pa. St. 147, 22 Atl. 844.

(2) Property already devoted to a public use cannot be taken by condemnation for the same public use. 1 Lewis, Eminent Domain (2d ed.), § 276; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; *In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; *Suburban R. Co. v. Metropolitan etc. R. Co.*, 193 Ill. 217, 61 N. E. 1090; *Petition of Philadelphia etc. R. Co.*, 203 Pa. St. 354, 53 Atl. 191; *Pittsburgh Junction R. Co.'s Appeal* (Pa.), 6 Atl. 564; *Mobile etc. R. Co. v. Alabama Midland R. Co.*, 87 Ala. 501, 6 South. 404; *Lake Erie etc. R. Co. v. Board of Com'rs*, 57 Fed. 945; *City of Albia v. Chicago etc. R. Co.*, 102 Iowa 624, 71 N. W. 541; *Sabine etc. R. Co. v. Gulf etc. R. Co.*, 92 Tex. 162, 46 S. W. 784; *Rutland-Canadian R. Co. v. Central Vermont R. Co.*, 72 Vt. 128, 47 Atl. 399; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. There is no priority of right to condemn. 2 Lewis, Eminent Domain (2d ed.), § 306; *Joplin etc. R. Co.*

v. Kansas City etc. R. Co., 135 Mo. 549, 37 S. W. 540; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *San Francisco etc. Water Co. v. Alameda Water Co.*, 36 Cal. 639; *New York etc. R. Co. v. Boston etc. R. Co.*, 36 Conn. 196; *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 119, 17 N. E. 678; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105. The White River Company can claim no rights in this proceeding prior to the 11th day of December, 1902, the day of the commencement of the condemnation proceedings. *Kanawha etc. R. Co. v. Glen Jean etc. R. Co.*, 45 W. Va. 119, 30 S. E. 86; *In re American Transp. & Nav. Co.*, 58 N. J. L. 109, 32 Atl. 74; *Minneapolis etc. R. Co. v. Chicago etc. R. Co.*, 116 Iowa 681, 88 N. W. 1082; *Indiana Power Co. v. St. Joseph etc. Power Co.*, 159 Ind. 42, 63 N. E. 304, 64 N. E. 468; *Kansas etc. R. Co. v. Northwestern Coal & Min. Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. 717, 51 L. R. A. 936. If there was priority, the Industrial Company is first in diligence, having completed its proceedings by purchase or otherwise, prior to the institution of the rival suit. *Providence etc. R. Co., Petitioner*, 17 R. I. 324, 21 Atl. 965; *Suburban R. Co. v. Metropolitan West Side Elev. R. Co.*, *supra*; *Union Term. R. Co. v. Kansas City Belt R. Co.*, 9 Kan. App. 28, 60 Pac. 541; *Chicago etc. R. Co. v. Starkweather*, 97 Iowa 159, 66 N. W. 87, 59 Am. St. 404, 31 L. R. A. 183; *Matter of Boston etc. R. Co.*, 53 N. Y. 574; *In re New York etc. R. Co. v. Union Steam-boat Co.*, 99 N. Y. 12, 1 N. E. 27; *Lake Shore etc. R. Co. v. New York etc. R. Co.*, 8 Fed. 858; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Evergreen Cemetery Ass'n v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; 1 Wood, Railway Law, 691; *Diamond Jo Line Steamers v. Davenport*, 114 Iowa 432, 87 N. W. 399, 54 L. R. A. 859; *Kanawha etc. R. Co. v. Glen Jean etc. R. Co.*, *supra*. The filing of the articles of the rival company is of no significance in this connection. *Morris etc. R. Co. v. Blair*, 9 N. J. Eq. 635; *Indiana Power Co. v. St. Joseph etc. Power Co.*, *supra*; Mills, Eminent Domain (2d

ed.), § 47. Nor is the magnitude of the enterprises. *Seattle etc. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217. The priority claimed by railroad companies rests entirely on statute. *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Barre R. Co. v. Montpelier etc. R. Co.*, 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785; *Williamsport etc. R. Co. v. Philadelphia etc. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; *Indiana Power Co. v. St. Joseph etc. Power Co.*, *supra*; *Samish River Boom Co. v. Union Boom Co.*, *supra*.

(3) The rivers in question are navigable, and condemnation of the waters therein involves an illegal and prohibited act. *Northern Pac. R. Co. v. United States*, 104 Fed. 691; *Leovy v. United States*, 92 Fed. 344; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 1001; *Escanaba etc. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *United States v. Rio Grande Dam etc. Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 20 Sup. Ct. 343, 44 L. Ed. 437. It is competent for the Industrial Company to raise this question. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855; *In re Brooklyn Elev. R. Co.*, 11 N. Y. Supp. 161.

(4) There is no power to condemn the waters, since they flow through an Indian reservation. *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; U. S. Const., art. 1, §§ 4, 8.

(5) The right of a corporation to condemn any species of property is a creature of statute, and it is incumbent upon the petitioning corporation to point out a statute giving such right expressly or by necessary implication. 1 Lewis, *Eminent Domain* (2d ed.), §§ 240, 254; *In re Poughkeepsie Bridge Co.*, 108 N. Y. 483, 15 N. E. 601; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *East St. Louis v. St. John*, 47 Ill. 463; *Howe v. Norman*, 13 R. I. 488; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21; *Vreeland v. Jersey City*, 54 N. J. L. 49, 22 Atl. 1052; *Mitchell v. Illinois etc. R. &*

Coal Co., 68 Ill. 286; *Currier v. Marietta etc. R. Co.*, 11 Ohio St. 228; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Sharp v. Speir*, 4 Hill 76; *In re Thomson*, 86 Hun 405, 33 N. Y. Supp. 467, aff. in *Thomson v. De Camp*, 147 N. Y. 701, 42 N. E. 726. The history of the legislation on the subject shows no such authority. See, Laws 1879, p. 124, Bal. Code, § 4281; Laws 1879, p. 134 as amended, Code 1881, § 2472, Bal. Code, § 7107; Laws 1891, p. 327, Bal. Code, § 4091; Laws 1895, p. 80, Bal. Code, §§ 5648-5650; Laws 1901, p. 299, Pierce's Code, §§ 5155-5157. The grant of incidental powers will not be held to include power to which the same are incidental. *Watson v. Acquackanonck Water Co.*, 7 Vroom 195; *Urdike v. Wright*, 81 Ill. 49; *Scruggs v. Reese*, 128 Ind. 399, 27 N. E. 748; 1 Lewis, Eminent Domain (2d ed.), § 256e; *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423, 60 N. E. 790; *In re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195. The diversion of water from a stream for power purposes without returning the same to the stream is unlawful. *Weiss v. Oregon Iron & Steel Co.*, 13 Ore. 496, 11 Pac. 255; *Garwood v. New York Cent. etc. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452.

(6) The White River Company could not condemn lands until the whole amount of its stock was subscribed. Bal. Code, § 4250; Pierce's Code, § 7053; Const., art. 12, § 8; *Puget Sound etc. R. Co. v. Ouelette*, 7 Wash. 265, 34 Pac. 929. Nor do business in this state. Bal. Code, §§ 4291, 4292, 4293; *Hampton v. Clinton Water Co.*, 65 N. J. L. 158, 46 Atl. 650; *Society Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *Atkinson v. Marietta etc. R. Co.*, 15 Ohio St. 21; *Matter of Brooklyn etc. R. Co.*, 72 N. Y. 245.

(7) The diversion was not at the place designated by the articles of incorporation; *expressio unius, exclusio alterius*. Clark & Marshall, Private Corporations, pp. 378, 380, 404; Green's Brice's Ultra Vires (2d Am. ed.), p. 62; *In re Water Com'rs etc.*, 3 Edw. Ch. (N. Y.) 552, 554; *Charles River Bridge v. The Warren Bridge*, 11 Pet. 516, 9 L. Ed. 812;

Syracuse v. Benedict, 86 Hun 343, 33 N. Y. Supp. 944. And the lands included property in King county outside the jurisdiction of the Pierce county court. Bal. Code, § 5641. The court also erred in the admission of evidence and in its findings as to the necessity of the appropriation; prospective use is insufficient. *Rensselaer etc. R. Co. v. Davis*, 43 N. Y. 137; *Colorado etc. R. Co. v. Union Pac. R. Co.*, 41 Fed. 293. The rights of the two companies are to be measured by their present necessities. *Butte etc. R. Co. v. Montana etc. R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298; *Kansas etc. Coal R. Co. v. Northwestern Coal & Min. Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. 717, 51 L. R. A. 936; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. 770; *Seattle etc. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107; *Spring Valley Water-Works v. San Mateo Water-Works* (Cal.), 28 Pac. 447; *Railway Company v. Alling*, 99 U. S. 463, 25 L. Ed. 438; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251, 8 N. E. 548; *Chicago etc. R. Co. v. Starkweather*, 97 Iowa 159, 66 N. W. 87, 59 Am. St. 404, 31 L. R. A. 183.

Thomas B. Hardin, James M. Ashton, and Norwood W. Brockett, for respondents (relators below), contended, among other things, that the use proposed by the power company is a public use. *Boston etc. Mill Corp. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.*, 12 Cush. 475; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 78; *Hankins v. Lawrence*, 8 Blackf. 266; *Burnham v. Thompson*, 35 Iowa 421; *Venard v. Cross*, 8 Kan. 248; *Miller v. Troost*, 14 Minn. 365; *Newcomb v. Smith*, 2 Pinn. (Wis.) 131; *Rockingham County L. & P. Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46; *State ex rel. Attorney General v. Toledo*,

48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410. The argument that the government retains no control was early answered in the railroad cases. *Beekman v. Saratoga etc. R. Co.*, 3 Paige Ch. (N. Y.) 45, 22 Am. Dec. 679; *Concord Railroad v. Greely*, 17 N. H. 47; *De Camp v. Hibernia R. Co.*, 47 N. J. L. 43; *Lexington & Ohio R. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Bloodgood v. Mohawk etc. R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313. And also in the telegraph and telephone cases. *Turnpike Co. v. American News Co.*, 43 N. J. L. 381; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.*, 5 W. Va. 382. The municipal uses contemplated justify the appropriation. 1 Idaho Codes (1901), p. 66; *Hollister v. State* (Idaho), 71 Pac. 541; *New Orleans Gas-Light Co. v. Louisiana Light etc. Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *In re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25; *Indiana Power Co. v. St. Joseph Power etc. Co.*, 159 Ind. 42, 63 N. E. 304, 64 N. E. 468; *Denver Power & Irr. Co. v. Denver etc. R. Co.*, 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383. The use in this case is a public use. *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; *Salt Lake City Water & Elec. Power Co. v. Salt Lake City*, 25 Utah. 441, 71 Pac. 1067; 1 Lewis, *Eminent Domain* (2d ed.), §§ 131a, 173; *Sultan Water & Power Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Thompson Houston Electric Co. v. Newton*, 42 Fed. 723; *State ex rel. Canton v. Allen*, 178 Mo. 555, 77 S. W. 868; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 726; *State ex rel. Kent Lum. Co. v. Superior Court*, 35 Wash. 303, 77 Pac. 382. This court impliedly upheld the right in, *Hathaway v. Yakima Water L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847, and *Yakima Water L. & P. Co. v. Hathaway*, 18 Wash. 377, 51 Pac. 471. The following have been held to be public uses: Telephone and tele-

graph plants. 1 Lewis, *Eminent Domain* (2d ed.), § 172; *Turnpike Co. v. American News Co.*, 43 N. J. L. 381; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. A plant for piping and thereby supplying oil to the public. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.*, *supra*. Plants for collecting and booming logs on streams. *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; 1 Lewis, *Eminent Domain*, § 177. A plant to supply gas for public and private lighting and heating. 1 Lewis, *Eminent Domain*, § 173; *State ex rel. Snyder v. Portland Natural Gas Co.*, 153 Ind. 483, 53 N. E. 1089, 74 Am. St. 314, 53 L. R. A. 413; *Johnston's Appeal* (Pa.), 7 Atl. 167. Irrigation plants. *San Diego Land etc. Co. v. Sharp*, 97 Fed. 395; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376; *Cummings v. Peters*, 56 Cal. 593; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Gutierrez v. Albuquerque Land & Irr. Co.*, 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588; *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635; 1 Lewis, *Eminent Domain* (2d ed.), §§ 160, 242; 10 Am. & Eng. Ency. Law (2d ed.), 1058, 1060; *Hollister v. State* (Idaho), 71 Pac. 541. The questions of necessity and expediency are for the legislature alone; it is not for the court to say whether the public can be adequately supplied in other ways, or whether a proper water power can be secured by private purchase. *Charleston Natural Gas Co. v. Low*, 52 W. Va. 662, 44 S. E. 410; *Bloodgood v. Mohawk R. Co.*, *supra*; *Gilmer v. Lime Point*, 18 Cal. 229; 1 Lewis, *Eminent Domain* (2d ed.), §§ 162, 237, 238; *Moseley v. New York Shore Water Co.*, 94 Ma. 83, 46 Atl. 809; *Concord R. v. Greeley*, 17 N. H. 47. The power to condemn for a public use is not affected by the inclusion in the articles of incorporation of other powers. *Lake Koen Nav. etc. Co. v.*

Klein, 63 Kan. 484, 65 Pac. 684; *Denver R. etc. Co. v. Union Pac. R. Co.*, 34 Fed. 386; 1 Lewis, *Eminent Domain* (2d ed.), § 160; *Hollister v. State* (Idaho), 71 Pac. 543; *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818, 34 L. R. A. 368; *In re Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Chicago R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Phillips v. Watson*, 63 Iowa 28, 18 N. W. 659; *Plecker v. Rhodes*, 30 Grat. 795; *Pocantico Water-Works Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; *In re Mayor of New York*, 135 N. Y. 253, 31 N. E. 1043. The plant was for "manufacturing purposes" within Const., art. 21. *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; *Beggs v. Edison Electric Illum. Co.*, 96 Ala. 295, 11 South. 381, 38 Am. St. 94; *Nassau Gas-Light Co. v. Brooklyn*, 89 N. Y. 409; *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; *Denver Power & Irr. Co. v. Denver etc. R. Co.*, 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383; *People ex rel. American etc. Dredg. Co. v. Wemple*, 129 N. Y. 558, 29 N. E. 812; *Commonwealth v. Keystone Electric L. etc. Co.*, 193 Pa. St. 245, 44 Atl. 326; *Southern Electric L. & P. Co. v. Philadelphia*, 191 Pa. St. 170, 43 Atl. 123; *Commonwealth v. Northern Electric L. & P. Co.*, 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107; *Commonwealth v. Edison Electric Light Co.*, 145 Pa. St. 131, 22 Atl. 841, 845, 27 Am. St. 683; *Commonwealth v. Brush Electric Light Co.*, 145 Pa. St. 147, 22 Atl. 844; *Commonwealth v. Edison Electric Light & P. Co.*, 170 Pa. St. 231, 32 Atl. 419; *Frederick L. & P. Co. v. Frederick City*, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; *St. Mary's Gas Co. v. County of Elk*, 191 Pa. St. 458, 43 Atl. 321; *Ridgway Light & Heat Co. v. County of Elk*, 191 Pa. St. 465, 43 Atl. 323. The rights of proprietors on a navigable stream are subordinate to public uses. *Minneapolis Mill Co. v. Board of Water Com'rs*, 56 Minn. 485, 58 N. W. 33; *St. Anthony Falls Water-Power Co. v. St.*

Paul Water Com'rs, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; *Gutierrez v. Albuquerque Land Co.*, *supra*; *People v. Baltimore etc. R. Co.*, 117 N. Y. 150, 22 N. E. 1026; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70. The right to appropriate water and apply it to a private beneficial use, or to a public beneficial use, is recognized and enforced in this state. *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809; *Northport Brewing Co. v. Perrott*, 22 Wash. 243, 60 Pac. 403; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308; *Isaacs v. Barber*, 10 Wash. 124, 38 Pac. 871, 45 Am. St. 772, 30 L. R. A. 665; 1 Bal. Code, §§ 4091, 4281, 4281a; Laws 1901, p. 299; *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635; *Larsh v. Test*, 48 Ind. 130. If appropriated by a *private* corporation and for a *private* use, and a prior riparian ownership exists on the stream below, the appropriator must purchase from or settle with the lower proprietor. *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107. The statutes authorize a foreign corporation to condemn land. Laws 1879, p. 124; Laws 1889-90, p. 288, Bal. Code, § 4291; *St. Louis etc. R. Co. v. Lewright*, 113 Mo. 660, 21 S. W. 210; *Southern Illinois etc. Bridge Co. v. Stone*, 174 Mo. 1, 73 S. W. 453; *Gulf etc. R. Co. v. Southwestern etc. Tel. Co.*, 25 Tex. Civ. App. 488, 61 S. W. 406; *Texas Midland R. Co. v. Southwestern etc. Tel. Co.* (Tex. Civ. App.), 57 S. W. 312; *Dodge v. Council Bluffs*, 57 Iowa 560, 10 N. W. 886; *New York etc. R. Co. v. Welsh*, 143 N. Y. 411, 38 N. E. 378, 42 Am. St. 734; *In re Marks*, 6 N. Y. Supp. 105; *Abbott v. New York etc. R. Co.*, 145 Mass. 450, 15 N. E. 91; *Union Pac. R. Co. v. Burlington etc. R. Co.*, 3 Fed. 106; *Gray v. St. Louis etc. R. Co.*, 81 Mo. 126; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477; *Dittenhoefer v. Cocur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Knapp, Burrell & Co. v. Strand*, 4 Wash. 686, 30 Pac. 1063; *Columbus Waterworks Co. v. Long*, 121 Ala. 245, 25 South.

702; *State ex rel. Attorney General v. Sherman*, 22 Ohio St. 411. The failure of the corporation to comply with statutory regulations whereby a penalty was incurred does not invalidate its transactions. *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 143, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827; *Marble Sav. Bank v. Williams*, 23 Wash. 766, 63 Pac. 511; *Whitman Agricultural Co. v. Strand*, 8 Wash. 647, 36 Pac. 682; *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893; *Tolerton & Stetson Co. v. Barck*, 84 Minn. 497, 88 N. W. 19; *Chattanooga etc. R. Co. v. Evans*, 66 Fed. 809; *Jarvis-Conklin Mtg. Invest. Co. v. Willhoit*, 84 Fed. 514; *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 252, 69 S. W. 572, 91 Am. St. 87; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203. Condemnation proceedings of a *de facto* corporation cannot be questioned by the land owner. 10 Am. & Eng. Ency. Law (2d ed.), 1059; *Brinkerhoff v. Newark etc. Traction Co.*, 66 N. J. L. 478, 49 Atl. 812; *Postal Telegraph Cable Co. v. Oregon Short Line R. Co.*, 114 Fed. 787; *Oregon Short Line R. Co. v. Postal Telegraph Cable Co.*, 111 Fed. 842; *Farnham v. Delaware etc. Canal Co.*, 61 Pa. St. 265; *West End Narrow Gauge R. Co. v. Almeroth*, 13 Mo. App. 91, 53 Am. Dec. 137; *Brown v. Calumet River R. Co.*, 125 Ill. 600, 18 N. E. 283; 1 Clark & Marshall, Private Corporations, p. 239; *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, 74 Pac. 686. The power company has the right to change the place of diversion of the waters. *Union Mill Co. v. Dangeberg*, 81 Fed. 115; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Offield v. Ish*, *supra*; 3 Farnham, Waters, p. 2095; 1 Morawetz, Corporations (2d ed.), §§ 320, 365; 1 Clark & Marshall, Corporations, p. 385. The following are additional late cases especially in point. *Brown v. Radnor Tp. Electric*

L. Co., 208 Pa. St. 453, 57 Atl. 904; *City of LaHarpe v. Elm Tp. Gas Light etc. Co.*, 69 Kan. 97, 76 Pac. 448; *Borden v. Trespalacios Rice & Irr. Co.* (Tex. Civ. App.), 82 S. W. 461.

RUDKIN, J.—The respondent herein is a corporation, organized as a water power company and an electric power company, pursuant to the laws of the State of New Jersey, and has complied with the laws of the State of Washington respecting foreign corporations. The objects for which the respondent is incorporated, as set forth in its articles, are:

“To develop, adapt and utilize for commercial purposes the water power afforded by the White river and other rivers and streams and bodies of water in the State of Washington, by the diversion of a portion of the water of the said White river from a point on or near the line dividing Secs. 29 and 32, township 20, north, range 6 east of Willamette Meridian, Pierce county, Washington, by means of a ditch, flume or canal to the point or points of use, together with certain water rights, water and reservoir appropriations, land options and filings, to develop, adapt and utilize for commercial purposes the water power afforded by such other streams and bodies of water, and to construct, operate and maintain a plant or plants for the electric transmission of power, light and heat from such source or sources of power to all cities, towns and other places economically accessible from said source or sources of power, to erect, own and operate a plant or plants for furnishing light, heat and power in such cities, towns and places, and to furnish light, heat and power therein for any purpose to individuals, and public and private corporations and municipal bodies, to store, transport and sell water and water power and privileges for any purpose, in connection with such rivers, streams and bodies of water, to purchase, erect, own and operate water works in connection therewith, to erect and maintain dams, reservoirs, mills, manufactories and other erections and to operate the same, to buy, own and sell real estate in connection with said business.”

The respondent proposes to erect and maintain a dam in the White river, near the town of Buckley, in Pierce county,

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and thereby divert the water of said river into a canal, through which the same will be conducted to a reservoir at Lake Tapps. From this reservoir, the water will be conducted through a further canal to the brow of the hill, near the town of Sumner, and there discharged through steel pipes on to the water wheels in the power house to be constructed at the foot of the hill. In this power house, the respondent proposes to install electrical generators, and other electrical appliances, for the purpose of generating or manufacturing electricity, to the amount of 50,000 electrical horse power. The electricity thus generated will be transmitted north and south, to the cities of Puyallup, Tacoma, Olympia, Auburn, Kent, Seattle, and the cities en route to the Canadian line, and sold in these cities and places, for the use of the public in municipal and public lighting, the operation of street and other railways, manufactories, private lighting and heating, and for other public uses. In aid of this enterprise, the respondent filed its petition in the court below, whereby it sought to condemn and appropriate certain lands and property belonging to the relator and others. At the preliminary hearing, the court found that the proposed use was a public one, and that the appropriation was necessary, and ordered a jury empaneled to assess the damages. This order is now before us for review.

At the threshold of the proceeding, the respondent is confronted with the objection that it is seeking to take private property for a private use, in violation of section 16, art. 1, of the state Constitution. If this objection is sustained, it will obviate the necessity of discussing or considering the other questions presented in the briefs and arguments of counsel. The section of the Constitution in question declares that,

“Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes,

or ditches, on or across the lands of others for agricultural, domestic, or sanitary purposes."

The term "public use," when applied to the law of eminent domain, is not easily defined. It has often been said that it is more easily defined by negation than otherwise. In determining the question of public use, courts have always been influenced, to a greater or less extent, by legislative declarations, and by local customs and conditions, and local necessities. In the states of Maine, Massachusetts, New Hampshire, Connecticut, New Jersey, Indiana, Iowa, Kansas, Wisconsin, and perhaps others, statutes permitting lands to be taken for the purpose of creating water power for milling and manufacturing purposes have been enacted and enforced, though not always without protest. The legislature of the state of New York has never authorized the exercise of the right of eminent domain in favor of mills of any kind, and it has been said that "sites for steam-engines, hotels, churches, and other public conveniences, might as well be taken by the exercise of this extraordinary power." *Hay v. Cohoes Co.*, 3 Barb. 42. It is safe to say that the courts of that state would not sanction the exercise of the power of eminent domain for any such purpose. *In re Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. 574, 49 L. R. A. 781. The courts of Michigan and Georgia have denied the right of eminent domain in similar cases. *Ryerson v. Brown*, 35 Mich. 332; *Loughbridge v. Harris*, 42 Ga. 500.

On the other hand, the courts of Alabama and Vermont have held that the right of eminent domain cannot be exercised in favor of gristmills, unless they are public mills, required by law to grind for all in due turn and for regular tolls. *Sadler v. Langham*, 34 Ala. 311; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398. In *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889, the court upheld the New Hampshire statute, as a

regulation of the manner in which the rights of proprietors of land adjacent to a stream may be ascertained and enjoyed with a due regard to the interest of all and the public good, but refused to pass upon the question whether the statute could be upheld as a delegation of the right of eminent domain. The courts of the mining and arid land states have also held that the use of water for mining and irrigation purposes is a public use.

The question is not a new one in this court. It was fully considered, in relation to another statute, in the case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964. The court there cites with approval, Lewis, *Eminent Domain*, § 165,

"Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application. If the constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts;"

from Cooley, *Constitutional Limitations*, p. 652,

"Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises; the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to

another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it;" and said,

"But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state."

And again:

"It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for grist-mills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses, and machine shops of almost every conceivable kind, would be entitled to some consideration for the same reasons; thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other; the difference is only in degree."

It will thus be seen that this court repudiated the broad and liberal construction adopted by the New Hampshire and other courts, and committed itself to the more restricted doctrine laid down by Judge Cooley in *Ryerson v. Brown*, and in his work on Constitutional Limitations, *supra*. In *Ryerson v. Brown*, the court, speaking through Chief Justice Cooley, said:

"Whether the use to which the machinery is to be put which is to be operated by the power can be declared a public use, is the question that remains to be considered. If the act were limited in its scope to manufactures which are of local necessity, as gristmills are in a new country not yet penetrated by railroads, the question would be some-

what different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact; in other words, *that it should contain provisions entitling the public to accommodations.* A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him, any more than could the manufacturer of shoes or the retailer of groceries. Indeed, the two last named would have far higher claims, for they would subserve actual needs, while the former would at most only incidentally benefit the locality by furnishing employment and adding to the local trade."

And again:

"What, then is the necessity for the exercise of this extraordinary power in aid of manufacturing corporations? It is certainly not a necessity of the extreme sort which supports the like authority in aid of railways. A railway cannot run around unreasonable land-owners; but no one man and no number of men can prevent the establishment of a machine shop, or a sawmill, by refusing to part with the lands they may happen to own. No particular motive power is indispensable. At the worst the question presented in any case will be a question of different degrees of convenience or of probable profits. A mill at one spot on a stream may be more profitable than at another; a machine shop at one point may be more cheaply operated by water power than by steam power; but steam is not excluded from any part of the state because of any general conviction that water power is more advantageous or more economical. When the owner of a mill site enters upon the calculation whether he shall improve the site in order to obtain operating power for machinery, or on the other hand provide steam machinery, the question that confronts him is not one of necessity, but of comparative cost, expense of operation and probable returns."

In *Varner v. Martin*, 21 W. Va. 534, the court holds that before a corporation can exercise the right of eminent domain it must possess each and all of these qualifications:

"First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property."

The court further says:

"Upon the principles we have laid down it would follow that the legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of lands by dams erected for sawmills or manufactories generally, because they obviously want the first qualification we have laid down as necessary to confer this power on the legislature. The general public have no definite and fixed use of any such mills and manufactories. They have no use of them which is independent of the will of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owner of them."

In *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855, the court of appeals of Virginia approved the rule announced by the supreme court of West Virginia, and applied it in a case very similar to the case at bar. The court quoted extensively from the decisions followed by this court in the *Healy Lumber Company* case, and held that the proposed use was not a public one. Speaking of the company and its objects, in that case, the court said:

"It is urged upon us that, although the charter in question does not command the performance of the company's public duties, since it is 'a public service corporation,' the right of public control arises from the grant of the franchise of eminent domain; and, when the company undertakes to

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devote its property and its products to the public use, it becomes subject to public regulations. This proposition is unquestionably sound, and sustained by the authorities cited,—*Munn v. Illinois*, 98 U. S. 113; *Budd v. People of New York*, 143 U. S. 538; *Brass v. North Dakota*, 153 U. S. 391,—to which many others might be added; but, this does not meet the difficulty in this case. The mere recognition of the corporation in its charter as an ‘internal improvement company’ does not make it so, and bring it within the operation of the general laws of the state governing such companies and controlling their operations. The difficulty with the charter is that the purpose for which the property is authorized to be taken by the right of eminent domain in this instance does not clearly appear to be for a public use or a public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed are vague, and the use which the public is to have of the property, or how the public is to be benefited by the use of it by the company, is by no means fixed and definite. Not only is the public benefit to spring from the use to which the company proposes to devote the property vague, indefinite, and uncertain, but, under the plain language of the charter, the public use of the property, or any use of it by the public, may be gainsaid or denied or withdrawn by the company at its will, since it is authorized to use, not only a part, but the entire product of the work or works it proposes to establish for its own use or benefit. In such a case the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking of private property for a private use, against the will of the owner, which cannot be done in any case.”

This is equally true of the respondent company. It is not claimed that there is a present demand for the 50,000 electrical horse-power. It is not claimed that the respondent has a franchise to enter any of the cities or towns mentioned, or that it will or can obtain one. It does not appear that there are any street or other railways to utilize its product. It is not under contract or obligation to furnish electricity to any person, or for any purpose. Under its articles, it

may erect and maintain mills and manufactories and operate the same. For aught that appears, aside from its professions and voluntary promises, it may take the relator's property, generate electricity or not, at will, and use the same for any purpose, public or private, to suit its convenience. In *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114, the court said:

"To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. *The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it.* It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, *a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public.*"

It is true, the supreme court of New Hampshire fully sustained the doctrine contended for by the respondent, in the case of *Rockingham County L. & P. Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46. But that decision was the natural outgrowth of a long line of decisions in the same court, which this court expressly declined to follow in the *Healy Lumber Company* case.

It is further contended by the respondent that the use in question is declared to be public by art. 21 of the state Constitution, which reads: "The use of the waters of this state for irrigation, mining and manufacturing purposes

shall be deemed a public use." We are not called upon, at this time, to determine the full import or meaning of this constitutional provision. What we have already said disposes of the question before us. If it was intended by the article in question to extend the right of eminent domain to private manufacturing corporations, or to authorize the taking of private property for a private use, it violates the due process clause of the Federal Constitution. A state is powerless, by statute or by constitutional provision, to declare a use public which is essentially and inherently private. In *Kaukauna Water Power Co. v. Green Bay etc. Canal Co.*, 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004, the court said:

"The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true, that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

In *Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489, the court said:

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

In *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, a statute of Utah, authorizing the taking of private property for an irrigation ditch, was upheld by a divided court, but the use was held to be a public one. The court said:

"But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

There is, however, a vast difference between the use of water for manufacturing and for irrigation. In the latter case, there is no choice of means or location. The necessity is an absolute one, if the land is to be reclaimed at all. Not so, with a manufacturing plant. The question of location and motive power is one of economy and convenience at most. In *In re Tuthill*, *supra*, the court said:

"I do not believe that the people of the state can affect, or impair, the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose which is essentially a private benefit, and which has always been held to be such."

In that case the court declared a provision of the constitution of the state of New York, authorizing the taking of private property for drains, invalid, because in conflict with the Constitution of the United States.

From a full review of all the authorities, we are convinced that the respondent is not a public service corporation, and that the use to which it intends to apply the property it now

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seeks to acquire is not a public use, within the meaning of the Constitution and laws of this state. We do not mean to say that the right of eminent domain can, in no case, be extended to a corporation organized for the purpose of generating and transmitting electricity for power and other purposes. But before this can be done, public necessity must require it, and the right of the public to the use and enjoyment of the property must be regulated, guaranteed, and safe-guarded by proper legislation.

For the reasons herein stated, the order must be reversed, with directions to dismiss the proceedings, and it is so ordered.

MOUNT, C. J., FULLERTON, CROW, HADLEY, and DUNBAR, JJ., concur.

ROOT, J., having been of counsel for interested parties, took no part.

(No. 5375. Decided September 5, 1905.)

VIRGINIA WILSON *et al.*, Appellants, v. WATSON HUBBARD *et al.*, Respondents.¹

INFANTS — JUDGMENTS — VACATION — LIMITATIONS. A judgment entered against infants upon proper service is not void, but voidable only, and cannot be attacked for fraud or error of law, under Bal. Code, § 5153, unless the proceeding is commenced within one year after the infants attain majority.

JUDGMENT—FINDINGS—RES JUDICATA. Findings of fact and conclusions of law in a suit in which no final judgment was entered are not res judicata of the issues determined.

APPEAL — REVIEW — HARMLESS ERROR — ERRONEOUS PARTITION OF LANDS LOST IN FORECLOSURE. Error in failing to vacate a decree of partition is not prejudicial, where the interests of all the parties were, subsequent to the partition, sold under mortgage foreclosures and there was nothing to authorize the vacation of the foreclosures.

SUBROGATION—LOAN TO PAY DEBTS OF ESTATE—WHEN NOT A VOLUNTEER. A mortgagee who in good faith loans money to one to whom

¹Reported in 32 Pac. 154.

the lands of an estate had been partitioned, and the money is used to pay the debts of the estate, is not a mere volunteer and is entitled to be subrogated to the rights of the creditors, upon the failure of his security through defects in the partition proceedings.

SAME—RE-INSTATING REDEEMED MORTGAGE. Upon a defense to the foreclosure of a void mortgage given by a guardian without authority, the plaintiff may plead the fact of a former valid mortgage on the property, which was redeemed by the guardian with the money loaned on the mortgage in suit, and is entitled to an equitable subrogation reinstating the former mortgage.

INFANTS—MORTGAGE OF LANDS. The authority to sell an infant's real estate does not give authority to mortgage it.

Appeal from a judgment of the superior court for Spokane county, Honorable A. G. Kellam, Judge *pro tempore*, entered March 11, 1904, upon findings in favor of the defendants, dismissing on the merits an action to vacate judgments. **Affirmed.**

Barnes & Latimer and Scott & Rosslow (Alfred M. Craven and Denton M. Crow, of counsel), for appellants.

William T. Stoll and B. B. Adams, for respondents.

CROW, J.—Action in the superior court of Spokane county, by appellants, Virginia Wilson and John Wilson, plaintiffs below, to vacate three certain decrees of said court; the first being in cause No. 2,332, a partition proceeding; the second, in cause No. 10,073, a foreclosure suit; and the third, in cause No. 10,072, also a foreclosure suit.

In their petition, plaintiffs alleged that one Virginia Wilson died February 14, 1888, leaving the defendant Charles D. Wilson, her husband, the plaintiffs, Virginia Wilson and John Wilson, and the defendants Frank Wilson, Ellen A. Wilson, Charles Wilson, and Spray Wilson, her minor children, as her only heirs at law; that all of said children were then under fourteen years of age; that she had executed a will making her husband her sole legatee; that said will did not mention any of said minor children, and by reason thereof was void as to them; that said Charles D. Wilson

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caused said will to be probated, took possession of the estate, and proceeded with administration thereof; that said Virginia Wilson died seized of about \$800 worth of personal property, and the following real estate, all in Spokane county, to wit: the west half of lot 3, in block 15, of the original town of Spokane Falls, now Spokane, known and hereinafter referred to as the Main street property; lots 1, 2, and 3, in block 14, of Post's addition to Spokane, known and hereinafter referred to as the Falls View property; and, also, 320 acres of land in section 13, Tp. 26, N., R. 42, E., W. M., known and hereinafter referred to as land, all being separate property of said decedent; that on April 8, 1902, plaintiff Virginia Wilson became eighteen years of age, and on October 26, 1902, plaintiff John Wilson became twenty-one years of age, this action being commenced within one year thereafter; that the defendant Spray Wilson was an infant sixteen years of age; that during said administration said Charles D. Wilson acted as guardian of all of the said children; that afterwards, and before said administration was completed, to wit: on September 22, 1901, said Charles D. Wilson, in his own proper person only, instituted, in the superior court of Spokane county, cause No. 2,332, hereinafter styled the partition proceedings, wherein he was plaintiff and all said children, Frank, Ellen A., Charles, John, Virginia, and Spray Wilson were defendants, praying partition of all real estate of said decedent; that at said time no account had been made by said Charles D. Wilson as executor; that the debts of said estate amounted to \$7,000, and that no real estate had been sold to pay the same; that on January 21, 1892, an order was made appointing referees to appraise and partition said real estate; that a partition was afterwards made and confirmed, whereby said Falls View property was allotted to said Charles D. Wilson, and the remainder of said real estate, to wit: the Main street property and land were

allotted to said minor children; that, at the time of commencing said partition proceedings and prior thereto, said Charles D. Wilson, as executor, had collected more than \$13,000 rents and profits from said estate, which he had failed to account for, but converted to his own use; that there was sufficient estate to have paid all debts and leave \$40,000; that said Charles D. Wilson, well knowing that in an accounting the rents and profits received by him would be set off against his distributive share, and leave him practically nothing, took advantage of his position of trust as such executor, and with the intent of defrauding said minors of their share of said estate, and of securing in his own name the sole title to said Falls View property, brought said action in partition, and in his complaint therein fraudulently and falsely alleged that all of said real estate was community property; that its income did not exceed \$1,000 per annum, and had not been sufficient to support himself and said minor children; that he had no money with which to satisfy a certain mortgage debt of \$1,500 and interest, upon the Main street property, which had been foreclosed; that he had, from time to time, in said probate proceedings, obtained orders to sell sufficient of said real estate to pay debts, but had been unable to make any sales.

Plaintiffs further alleged that, in fact, the income from said estate had been \$3,000 per annum, more than sufficient to pay all debts; that said executor had never made any *bona fide* attempt to sell any of said real estate, under the orders of said court in said probate proceedings; that, in pursuance of his said fraudulent intent, said Charles D. Wilson in said partition proceedings studiously avoided any showing as to the precise condition of his accounts as executor; that said Charles D. Wilson, while acting as guardian of said minors, never filed any bond, except one of \$500, the sureties on which were insolvent; that his executor's bond was only for \$4,800; that said bonds were

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grossly inadequate; that in said partition proceedings one R. C. Hall was appointed to take testimony; that testimony taken before said Hall was filed with the clerk of said court on January 19, 1892, but that no order appointing said Hall was ever entered prior to January 21, 1892; that no order appointing a guardian *ad litem* was ever entered prior to January 21, 1892, on which date the court, relying upon the testimony taken by said Hall and upon his report, and ignorant of the true facts, being deceived by the conduct of the said Charles D. Wilson, did enter an interlocutory decree directing partition and appointing referees; that the court was without jurisdiction to make said decree; that no objections were made to said report or decree by the guardian *ad litem*; that the referees appointed were intimate friends of said Charles D. Wilson, acting under his influence and suggestions; that they had no knowledge of real estate values; that they took no evidence; that they exercised no judgment, but guessed at values, placing the value on said Charles D. Wilson's portion of said land at \$15,000, and on the share allotted to said minors at \$14,000; that said partition was grossly unequal and unjust; that the said Falls View property, being the property allotted to said Charles D. Wilson, was then worth \$35,000, and was then only encumbered by a mortgage of \$1,400; that said land allotted to said minors was encumbered by a mortgage of \$1,100 with interest, while said Main street property, also allotted to said minors, had already been sold under mortgage foreclosure on February 7, 1891, and that the equity in all the property allotted to said minors was worth not to exceed \$1,100; that the court, ignorant of the fraudulent conduct of Charles D. Wilson and the unfair partition of said referees, and influenced thereby, and, also, by the fact that but a short time would elapse before the expiration of the period of redemption from said foreclosure sale of said Main street property, did, on January 26, 1892, enter a final decree of partition, and in so

doing allotted to said minors said Main street property and land, and allotted to said Charles D. Wilson said Falls View property; that, in said decree, said court directed that one-half of the indebtedness of said estate be made a lien upon land allotted to said Charles D. Wilson, and the other half upon the lands allotted to said minors; and also decreed that said Charles D. Wilson, as guardian of said minors, be authorized and empowered to mortgage the whole or any part of the real estate allotted to said minors, for the purpose of raising sufficient funds to pay off and discharge one-half of the indebtedness of said estate, less \$1,000, the difference in value of the lands partitioned to said Charles D. Wilson and said minors; that, subsequently, on March 21, 1892, said Charles D. Wilson, assuming to be the owner of said Falls View property, executed a mortgage thereon for \$7,000, and, as guardian of said minors, also executed a separate mortgage on said Main street property for \$3,000; that said mortgages were made to Rogers and Roberson, agents for the defendant Watson Hubbard, and were by them immediately assigned to said Hubbard.

The petition herein further alleged that, on or about September 25, 1895, the said Hubbard commenced two separate foreclosure actions, in the superior court of Spokane county, one being cause No. 10,073, on said \$7,000 mortgage executed by said Charles D. Wilson in his own right, and the other being cause No. 10,072, on said \$3,000 mortgage executed by said Charles D. Wilson as guardian; that, at the time of the commencement of said actions, the plaintiffs herein were under the age of fourteen years, and they were not served with process therein; that, in cause No. 10,073 to foreclose said mortgage of \$7,000, all of said minors, being made defendants, appeared by their guardian *ad litem*, and, answering, disclaimed any interest in the Falls View property subsequent to said mortgage, but claimed prior and paramount adverse title and asked to be dismissed; that, after trial upon the issues found, and be-

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fore entry of final decree, the said superior court in said cause No. 10,073 permitted said Hubbard to file a second amended complaint to correspond with the facts proven upon the hearing; that, in said second amended complaint, said Hubbard in substance alleged that the proceeds of the loan made by him to the said Charles D. Wilson upon said mortgage were applied in payment of a prior mortgage lien upon said Falls View property, and, also, other debts of the estate of said Virginia Wilson, deceased (which however did not include the foreclosed mortgage on said Main street property), and asked to be subrogated to the rights of the former holders of said liens against said estate; that, thereupon, a decree of foreclosure was entered, and from the findings of fact, conclusions of law, and said decree, it appears that the court found and adjudged said Hubbard to be entitled to such subrogation; that, afterwards, at a sheriff's sale, said real estate was purchased by said Hubbard, who afterwards obtained a sheriff's deed, and now has possession of said Falls View property claiming title thereto.

Said petition further alleged that, in said cause No. 10,072, said Hubbard foreclosed upon the Main street property said mortgage executed by Charles D. Wilson as guardian, but failed to allege the fact, shown by the record, that in said cause 10,072, said Hubbard amended his complaint, pleading his equitable right to be subrogated to the prior foreclosed mortgage on said Main street property, which was paid with the money loaned by him, but for some unexplained reason a copy of his amended complaint is attached to plaintiffs' petition herein as an exhibit. Plaintiffs, however, do allege sale of said Main street property under said foreclosure proceedings, and a purchase thereof by respondent Hubbard, who now holds possession and claims title.

Plaintiffs asked the court to vacate the final decree in said partition proceedings, for: (1) Want of jurisdiction in

said court to make said partition; (2) fraud upon the part of said Charles D. Wilson in obtaining an unfair partition; and (3) error claimed. They also asked the court to vacate the foreclosure proceedings in said causes No. 10,073, and 10,072, for error claimed.

The defendant Spray Wilson, a minor, appeared by her guardian *ad litem* properly appointed, and answered, asking that her interests be protected. The defendant Watson Hubbard answered, and for affirmative defense, alleged that, sometime in 1896, Frank Wilson and Ellen A. Wilson, defendants herein, within twelve months after they had severally arrived at the age of majority, commenced cause No. 10,049 in the superior court of Spokane county, against the defendants Charles D. Wilson and Charles Wilson, and against the said John Wilson and Virginia Wilson, plaintiffs herein, who were defendants in said action, and against said Spray Wilson and Watson Hubbard, defendants herein, to vacate said partition decree; and in their complaint, in substance, alleged the identical facts alleged and set forth in the petition herein; that in said action the plaintiffs herein, John Wilson and Virginia Wilson, being duly served with process, appeared by their guardian *ad litem* duly appointed; that said defendant Watson Hubbard also appeared and resisted said action; that, on trial, evidence was introduced on both sides, a complete hearing had, and the court made findings of fact and conclusions of law, upon the issues joined, in favor of said Hubbard, said conclusions of law being: (1) That said partition decree sought to be set aside should be in all respects confirmed and approved; (2) that the plaintiffs take nothing in said action; (3) that the said Watson Hubbard recover his costs. The answer of said Watson Hubbard fails to allege, nor does it appear, that any final decree was ever entered upon said findings of fact and conclusions of law, which are here pleaded by him as *res judicata*.

In his answer, said Hubbard also pleaded said foreclosure

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proceedings in cause 10,073 of said mortgage executed by and Charles D. Wilson on said Falls View property, setting forth at length his second amended complaint, in which he invoked the equitable doctrine of subrogation, together with the findings of fact, conclusions of law, and decree of the court sustaining said claim to subrogation. He also pleaded the foreclosure proceedings in cause No. 10,072 on said mortgage executed by said Charles D. Wilson as guardian, and the sale thereunder. He pleaded his amended complaint in said action, which alleged his equitable right of subrogation to said prior foreclosed mortgage paid by the proceeds of his loan, and also set forth at length the findings of fact, conclusions of law, and decree entered by the trial court sustaining such plea of subrogation. He also claimed both of said foreclosures to be *res judicata*.

The defendant Charles Wilson filed an answer in which he admitted the allegations of the petition, and by way of cross-petition affirmatively pleaded, in substance, the same facts alleged in the original petition, and asked the same relief demanded by plaintiffs. From his answer, it appears that he attained the age of majority on May 6, 1901, more than twelve months prior to the commencement of this action. The defendants Frank Wilson and Ellen A. Wilson also filed an answer admitting the allegations of the petition, and also of the cross-petition of the defendant Charles Wilson, and prayed for the same relief demanded by plaintiffs.

Trial was had upon these pleadings. Findings of fact and conclusions of law were made, and a final decree was entered refusing to vacate any of said judgments, and affirmatively quieting the title of the defendant Watson Hubbard to all real estate upon which he had made foreclosure. From said final judgment, this appeal has been taken by the plaintiffs, Virginia Wilson and John Wilson, the defendants Frank Wilson, Ellen A. Wilson, and Charles

Wilson, and by the defendant Spray Wilson, by her guardian *ad litem*.

The above, although quite lengthy, contains only a portion of the many complicated facts and issues herein, but is sufficient for a discussion of the principles involved. Appellants are proceeding under sections 5153 and 5156, of chapter 17, Ballinger's Code, relative to the vacation and modification of judgments. Section 5153 provides that,

"The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term [time] at which such judgment or order was made, to vacate or modify such judgment or order:— . . . (4) For fraud practiced by the successful party in obtaining the judgment or order; (8) For error in a judgment shown by a minor, within twelve months after arriving at full age."

Section 5156 provides that,

"The proceedings to obtain the benefit of subdivisions two, three, four, five, six, and seven of section 5153 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability."

Under these sections, appellants contend that, having commenced this action within one year after attaining majority, they are entitled to attack said original judgments first, for fraud practiced by the successful party in obtaining the same; and, second, for error shown. It is alleged by appellants that they were not served with process in any one of said actions, while respondent Hubbard alleged they were properly served, and were represented by guardian *ad litem*. Upon this issue, we must, from examination of the record, sustain respondent's contention. A judgment entered against

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a minor upon proper service is not void, but voidable only, and unless attacked within the proper period after the disability of infancy has ceased to exist, continues to be as valid as though rendered against persons under no disability whatever. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; 1 Daniell, Chancery Pr. (6th. Am. ed.), § 164; Black, Judgments (2d ed.), § 193; *Porter v. Robinson*, 10 Ky. 253, 13 Am. Dec. 153, and note; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Harrison v. Wallton's Ex'r*, 95 Va. 721, 30 S. E. 372, 64 Am. St. 830, 41 L. R. A. 703; *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11, 76 Am. St. 543.

Upon attaining majority, and within the time limited either by the rules of common law or statute, such minors may attack any such judgment for fraud or error shown. In this state, statutory relief is afforded, as said sections 5153 and 5156 secure to appellants herein one year after coming of age, within which, by proper proceedings and upon proper showing and allegations, they may attack said judgments for fraud, or for error shown. *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099.

Fraud sufficient to authorize such an attack must clearly appear from the allegations of the petition for vacation, showing not only that such fraud existed, but also that the court was influenced and deceived thereby, and induced to enter a judgment or decree prejudicial to the interests of said infants. Where it is sought to vacate a decree on the ground of error shown, said error must be prejudicial, must clearly appear upon the face of the record in the original proceedings, and must be such error as would have entitled the minor to a reversal of said decree or judgment upon appeal, had he been under no disability at the time of its entry, and in a position to prosecute such appeal. *Webster v. Page*, 54 Iowa 461, 6 N. W. 716.

Keeping these principles in mind, it becomes necessary

to examine the pleadings, records, and proceedings herein, and ascertain what relief, if any, appellants are entitled to receive. Appellant Charles Wilson is entitled to no relief, because he made no application therefor within the time provided by law. For the same reason, the appellants Frank Wilson and Ellen A. Wilson cannot recover, not having assailed said foreclosure decrees. As to said appellants, the judgment of the superior court should be, in any event, affirmed. *Wolferman v. Bell*, 8 Wash. 140, 35 Pac. 603; *Hill v. Lowman*, 15 Wash. 503, 46 Pac. 1042; *Eisenmenger v. Murphy*, 42 Minn. 84, 43 N. W. 784, 18 Am. St. 493.

Respondent Watson Hubbard, as above stated, has pleaded the proceedings in said cause No. 10,049, instituted by Frank Wilson and Ellen A. Wilson to vacate said partition decree, alleging the same to be *res judicata* as against all the appellants, on the theory that they were all served with process therein, and appeared and contested said action by their guardian *ad litem*. The record in said cause shows that findings of fact and conclusions of law were made which would have entitled respondent Hubbard to a decree in his favor, but no final decree was entered. In the absence thereof, said findings of fact and conclusions of law are not *res judicata*.

"The weight of authority supports the view that it is not the finding of the court or the verdict of the jury rendered in an action that concludes the parties in subsequent litigation, but the judgment entered thereon, for the verdict when rendered, is under the control of the court in which the action was tried, and may be set aside for good reasons, and hence it is necessary, in order to support the plea of *res judicata*, that a judgment, decree, or final order should have been actually rendered and entered in the prior action or suit." 24 Am. & Eng. Ency. Law (2d ed.), 792.

See, also, *Child v. Morgan*, 51 Minn. 116, 52 N. W. 1127.

Having made these observations, we will now proceed to consider what right, if any, appellants Virginia and John

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Wilson, plaintiffs below, and appellant Spray Wilson, minor defendant below, have to relief herein, and in so doing will separately discuss said three original judgments assailed by them.

(1) As to the partition decree: It appears that, upon the trial of this action in the court below, the appellants offered oral evidence tending to prove the various charges of fraud contained in their petition, and also offered certain record evidence tending to show that the real estate, of which their mother died seized, was her separate property. These offers being rejected, appellants assign error. We think appellants' petition as to the final decree in said partition proceedings stated a cause of action, and that sufficient fraud was alleged therein to have authorized the admission of the evidence offered, had no litigation occurred subsequent to said partition decree to so change the situation as to cause said evidence to become immaterial. Appellants contend they are entitled to a vacation of said partition decree by reason of: (1) Fraud alleged; (2) want of jurisdiction; (3) error shown. The allegations of their petition clearly show fraud. We think, however, the court had jurisdiction to enter said decree, said cause No. 2,332 being an action in partition, and no creditors of the estate of said decedent appearing or objecting.

As to the third proposition, for the reasons hereinafter stated, we do not deem it necessary to discuss the question whether error has been shown upon the record. No possible benefit could enure to appellants from a vacation of said partition decree, unless, upon a rehearing of said cause, they could secure some tangible beneficial relief not now enjoyed by them. For reasons hereinafter stated, however, we hold that neither one of said foreclosure decrees can be vacated. This being true, an order vacating the partition decree would not, upon a retrial of the partition action, enable appellants to secure any additional property or benefit therein, as all the real estate, claimed to have been unjustly

allotted to Charles D. Wilson, and also said Main street property, have been forever lost to the estate, leaving only the farm land which has been allotted to said minors, and which, so far as this record shows, they still have. It would certainly be an idle proceeding to now vacate said decree for fraud or error. Under these circumstances, we think the trial judge, in sustaining an objection to the offer of said evidence, did not commit prejudicial error, nor did he err in refusing to vacate said partition decree.

(2) As to the foreclosure in cause No. 10,073 of the mortgage executed by Charles D. Wilson in his own proper person: Appellants, in attacking said decree, have not made any allegations sufficient to show fraud upon the part of respondent Watson Hubbard in taking or foreclosing said mortgage. It appears that, when he took said mortgage, said Charles D. Wilson professed to execute the same in his own right, and under said partition proceedings had apparent record title to, and possession of, the real estate involved. Respondent Hubbard took said mortgage in good faith, paying a valuable consideration therefor. It is true that in said foreclosure action respondent Hubbard, being plaintiff therein, made all said minor heirs defendants, who, being served with process, appeared by guardian *ad litem*, pleaded paramount title, and asked to be dismissed. Under an order of the court, however, properly obtained, said Hubbard amended his complaint alleging his equitable right to be subrogated to the liens of creditors of said Virginia Wilson, deceased, for debts paid with money loaned by said respondent Hubbard to said Charles D. Wilson on the faith of said mortgage. One who in good faith lends money which is actually used to pay debts of an estate, under an agreement that he shall have security upon the estate, and in pursuance of said agreement takes a mortgage for his security, which proves invalid, will be subrogated to the benefit of the liens held by the creditors of said estate who were paid with his money. Sheldon, Subrogation, § 8; *Detroit*

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etc. Ins. Co. v. Aspinwall, 48 Mich. 238, 12 N. W. 214; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. 492; *Wyman v. Johnson*, 68 Ark. 369, 59 S. W. 250; *DeConcillio v. Brownrigg*, 51 N. J. Eq. 532, 25 Atl. 383; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303.

In his second amended complaint, respondent Watson Hubbard alleged that the money loaned by him upon the faith of said mortgage security had been actually used by said Charles D. Wilson to discharge debts of said estate, and the trial court made findings of fact upon said allegation in favor of said respondent, thereby subrogating him to the liens of said creditors, and affording him equitable relief to which he was entitled. In this the trial court did equity. Respondent Hubbard was thereby equitably subrogated to liens which were prior to any interests of said minor heirs, who, as against such prior liens, could not successfully plead paramount title. Respondent Hubbard, in making said loan, was not a mere volunteer making payment of the debts of said decedent in such a manner as to deprive him of the right of subrogation. We are unable to find any fraud alleged, or error apparent on the record in said foreclosure cause No. 10,073, which would entitle appellants to a vacation of the decree therein.

(3) As to the foreclosure in cause No. 10,072 of the mortgage executed by Charles D. Wilson as guardian: This foreclosure action was finally tried upon an amended complaint, in which said Hubbard pleaded the fact of a former mortgage executed by said Virginia Wilson, mother of said minors, its foreclosure, and the redemption of the real estate therefrom with the identical money loaned to said guardian by said Hubbard. The order of the court authorizing the execution of said mortgage was also pleaded. In fact, said respondent Hubbard, in said amended complaint, pleaded facts which, beyond question, entitled him to the benefit of the equitable doctrine of subrogation; and the trial court

made findings on all of said facts in favor of said Hubbard, and entered an equitable decree thereon.

Appellants, however, claim that the order of the trial court in the partition proceedings authorizing said mortgage was void, and that it was error to order its foreclosure.

"It seems to be a doctrine sustained by a preponderance of authority that a court of equity has no power, as a part of its jurisdiction over infants, to order a sale of the infant's real estate for purposes of maintenance, education, or investment." 3 Pomeroy, Equity Jurisprudence, § 1309. See, also, *Rogers v. Dill*, 6 Hill 415; *Trutch v. Bunnell*, 11 Ore. 58, 4 Pac. 588, 50 Am. Rep. 456; *Hoyt v. Jaques*, 129 Mass. 286. If, in absence of statutory authority, a court of equity has no power to order a sale of an infant's real estate, certainly it could not authorize a guardian to mortgage the same. Counsel for respondent Hubbard contend that, under the circumstances shown here, a court of equity has inherent power to authorize said mortgage to secure the preservation of the estate of said minors from imminent loss, and in support of such contention cite, with much confidence, the case of *Northwestern Guaranty L. Co. v. Smith*, 15 Mont. 101, 38 Pac. 224, 48 Am. St. 662. It is true that said case substantially announces the doctrine contended for, the syllabus in the official report reading as follows:

"The absence of a statute authorizing a guardian to mortgage his ward's real estate does not render void a mortgage given by a guardian under an order of the district court by which no new debt is created, but merely an exchange of one creditor for another is effected and an advantageous extension of time and reduction of interest secured."

An examination of the statement of the case made by the learned judge who delivered the opinion will show said action was instituted to foreclose a mortgage executed by a guardian under an order of court. The complaint in foreclosure not only pleaded said mortgage and its history, but

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also fully alleged facts showing the holder thereof to have loaned funds which were used by the guardian to pay a previous valid mortgage, on the same real estate, for no greater sum, upon which immediate foreclosure was threatened, thereby preserving the estate of the ward, temporarily at least, from absolute loss. We think said facts entitled the plaintiff to the benefit of the equitable doctrine of subrogation which we have heretofore discussed. Respondent Hubbard was undoubtedly entitled to the same equities in said cause No. 10,072. We do not think, however, that the facts pleaded in the Montana case warranted the doctrine there implied, to the effect that the court, in the absence of statute, had authority to order the execution of said mortgage. In said Montana case the mortgage was authorized in an action instituted for the sole purpose of obtaining such order, while here the order was entered in an action in which said Charles D. Wilson, as guardian of said minor, was not even a party, in a most irregular and erroneous manner, and without jurisdiction. Yet in that case, as in this, the mortgage was executed, and thereby a valid prior mortgage was discharged, and the real estate was temporarily saved from loss. The final judgment in the Montana case directing a demurrer to the foreclosure complaint to be overruled was undoubtedly right. In this state we have statutes authorizing an order to sell an infant's real estate, Bal. Code, §§ 6411-6416, and §§ 6460-6469; but authority to mortgage cannot be implied from such authority to sell. *Trutch v. Bunnell, supra.*

The facts exist, however, that a purported mortgage was executed by said Charles D. Wilson, guardian, in pursuance of said pretended order of court; that respondent Hubbard in good faith loaned his money on the faith thereof; that the money so loaned was used to pay a valid lien on said real estate which was prior and paramount to any interests of appellants, and that thereby a threatened, immediate, and final loss of their property was obviated. Conceding the

order to mortgage and the mortgage itself to have been void, nevertheless respondent Hubbard, under the doctrine of subrogation, was equitably entitled to have the former mortgage reinstated and foreclosed for his benefit. *Crippen v. Chappel, supra*. This in effect was the substantial result of the final decree in said cause 10,072, and in doing justice here, it becomes an immaterial consideration as to whether said guardian's mortgage was void. Appellants have not offered or shown any willingness to pay the amount now due on the prior mortgage executed by their mother, neither have they offered to redeem from respondent's mortgage. We fail to see that they have shown any defense to respondent's claims. The superior court certainly had jurisdiction in cause No. 10,072 of the subject-matter and the parties, and appears to have done equity. We fail to find any prejudicial error in said foreclosure decree, and the trial court committed no error in refusing to vacate the same.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, and ROOT, JJ., concur.

(No. 5437. Decided September 5, 1905.)

JOHN O'TOOLE, *Respondent*, v. PHOENIX INSURANCE
COMPANY OF HARTFORD, CONN., *Appellant*.¹

NEW TRIAL—INADVERTENCE AND SURPRISE—AFFIDAVIT OF MERITS AFTER ISSUE JOINED. Upon a motion for a new trial on account of inadvertence and surprise, after issue of fact joined, it is not important that the application does not show a meritorious defense, where both parties considered a trial necessary, and the denials of the complaint required a trial irrespective of the affirmative defenses.

JUDGMENT—VACATION—INADVERTENCE AND SURPRISE—MISTAKE IN NOTIFYING COUNSEL OF DATE OF TRIAL AS AGREED UPON—EXCUSABLE NEGLIGENCE—ABUSE OF DISCRETION. It is an abuse of discretion to refuse to grant a new trial on the ground of inadvertence and surprise, where the defendant's failure to appear at the time the cause was

¹Reported in 82 Pac. 175.

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set for trial was due to an excusable misunderstanding between counsel, arising in their correspondence, plaintiff's counsel having agreed to give notice of the time, and having sent a telegram to the wrong place, which was not delivered, instead of writing as they stated they had, and defendant's counsel having held himself and a witness in readiness awaiting such notice; a liberal rule applying in furtherance of justice when the showing is not manifestly insufficient.

SAME—IMPOSITION OF TERMS. Upon granting a new trial for inadvertence or surprise not due to the fault of the adverse party, the terms imposed should be the payment of the adverse party's costs.

Appeal from an order of the superior court for Thurston county, Linn, J., entered July 14, 1904, refusing a new trial, after a judgment entered upon the verdict of a jury, upon the failure of defendant to appear. Reversed.

H. T. Granger, for appellant.

Israel & Mackay and *Troy & Falknor*, for respondent.

Crow, J.—This appeal is prosecuted to reverse the action of the superior court of Thurston county, in refusing to vacate and set aside a judgment entered upon the verdict of a jury, after trial had in the absence of appellant and its counsel. The grounds upon which relief was sought, were mistake, inadvertence, and surprise.

The record shows the following facts, which are undisputed, and which are urged by appellant in support of its motion: This action was instituted by respondent, John O'Toole, against the Phoenix Insurance Company of Hartford, Connecticut, appellant, upon certain fire insurance policies, to recover for losses sustained. The issues of fact being fully formed, the case was set down for trial on June 16, 1904. On June 6th, in a conversation with H. T. Granger, sole attorney for appellant, Mr. Israel, of Israel & Mackay, residing in Olympia and counsel for respondent, stated that Mr. Granger, who resided in Seattle, need not come to Olympia to attend the trial until he re-

ceived word from Mr. Israel, who would telephone him in ample time to enable him to be present. Mr. Granger at said time had a case set for trial in Spokane for June 9th. The Spokane case being postponed until June 13th, Mr. Granger on June 12th telephoned to Mr. Israel at Olympia that he had a trial at Spokane commencing June 13th, that he was uncertain as to how long it would continue, but that as soon as it was completed, he would go to Olympia to try this action. The Spokane trial was finished on June 15th, and on that date Mr. Granger telegraphed Messrs. Israel & Mackay from Spokane as follows:

"Spokane, Wash., June 15, 1904.

"Israel & Mackay, Olympia Wash.: Can leave here tonight. What is situation? Answer care of Hotel Victoria. H. T. Granger."

Mr. Israel being absent from his office, his partner, Mr. Mackay, immediately replied by wire as follows:

"Olympia, Wash., June 15, 1904.

"H. T. Granger, Hotel Victoria, Spokane, Wash.: Impossible to reach your case this week. Have written. Israel & Mackay."

Israel & Mackay did not write, but instead, wired again as hereinafter stated. On the morning of June 16th, Mr. Israel called the court's attention to this case, the trial being delayed by reason of the congested condition of the calendar, and a resetting was definitely made for June 21st. Thereupon, instead of writing, Israel & Mackay wired Mr. Granger at Spokane as follows:

"Olympia, Wash., June 16, 1904.

"H. T. Granger, Hotel Victoria, Spokane, Wash.: O'Toole case assigned for next Tuesday morning, 21st instant. Israel & Mackay."

Mr. Granger having left Spokane; this telegram did not reach him until after judgment had been entered herein. He had returned to Seattle, where, on Thursday, Friday, and Saturday, the 16th, 17th, and 18th of June, he held

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himself and a witness in constant readiness to go at once to Olympia on receiving word from Mr. Israel. Having ordered his mail forwarded from Spokane, he also expected the letter mentioned in the Israel & Mackay telegram of the 15th. On Monday morning, June 20th, having received no word either by letter or telephone, he caused his clerk to mail at Seattle, the following letter in time for the same to reach Olympia that day:

"June 20, 1904.

"Messrs. Israel & Mackay, Olympia, Wash.

"Gentlemen: Your telegram was received by me at Spokane last Wednesday saying you had written. I have received no letter, therefore suppose you have been busy trying other cases. I wish you would wire me tomorrow at my expense what the probabilities are about reaching our case. I have been holding myself in readiness to come at any time in response to a notice from you ever since last Thursday. Yours truly, H. T. Granger."

This letter, which was mailed in a return envelope, is not shown to have ever reached respondent's attorneys, who deny having received it, while Mr. Granger says it has never been returned to him. On Tuesday morning, June 21st, the case was called for trial, but appellant and its counsel being absent, was continued until 2:00 p. m., at which time it was again called; and, no one appearing on behalf of appellant, a jury was empaneled, and a verdict rendered for respondent for \$2,800, the full amount claimed by him, and on said verdict the judgment complained of was entered. Mr. Granger, having received no word by letter or otherwise, called Israel & Mackay by telephone, on the morning of June 22nd, and was then advised of the trial, verdict, and judgment. He immediately filed appellant's motion, supported by affidavits, to set aside said judgment. Controverting affidavits were filed, but the above facts seem to be undisputed.

Some question is raised in the briefs as to whether appellant's answer states a meritorious defense to the com-

plaint. Both parties having regarded the issues of fact as of sufficient importance to necessitate a trial, and respondent having actually conducted a jury trial thereon in the absence of appellant, we will not pass on the sufficiency of the answer further than to state that the denials of the allegations of the complaint would prevent a recovery by respondent without the introduction of evidence by him. It is therefore unnecessary for us to discuss appellant's affirmative defenses. *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351.

In *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537, this court in discussing the showing made in support of an application to vacate a judgment said:

"The rule in cases of this character seems to be, and of right ought to be, that 'where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.'"

Under the facts shown, as above stated, we think the judgment should have been vacated, and that the refusal of the trial court to vacate the same was such an abuse of discretion as to constitute prejudicial error. Appellant's attorney was holding himself in constant readiness to appear in Olympia and try the case. He almost momentarily expected to hear from respondent's attorney either by letter or wire in ample time to do so. Respondent's attorneys, however, having on June 16th, as they supposed, advised Mr. Granger by wire, sent to Spokane, that the trial would occur on the 21st, naturally concluded that he knew the situation, and did not communicate with him further. They, doubtless, understood from this telegram of the 15th that he would await instructions in Spokane, and wired him there after his departure. On the other hand, by his wire of the 15th, "Can leave here tonight," he doubtless meant to convey the idea that he would leave that night either for Olympia or Seattle, as the situation demanded. An honest mistake was doubtless made by each of the

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parties, and if by reason thereof appellant's attorney was guilty of any negligence, the facts shown convince us such negligence was not inexcusable, but was simply the result of mistake or inadvertence. Under these circumstances, appellant should not be deprived of its right to a vacation of the judgment. Respondent not appearing to have been in fault by reason of any acts of himself or his attorneys, should not be required to submit to a new trial without the imposition of terms. Finding this judgment to have been entered as the result of mistake, inadvertence, and excusable neglect on the part of appellant, we think it should be vacated only upon payment of costs.

It is ordered that the judgment of the honorable superior court be reversed, and the cause remanded, with instructions to set aside the judgment and grant a new trial, on condition that appellant shall, within ten days after the filing of the remittitur, pay to the clerk of the superior court, for said respondent, the sum of \$200.80, the costs taxed in said judgment. Under authority of Bal. Code, § 6528, it is further ordered that the costs of this appeal abide the result of this action.

MOUNT, C. J., RUDKIN, HADLEY, and ROOT, JJ., concur.

FULLERTON and DUNBAR, JJ., dissent.

(No. 5598. Decided September 5, 1905.)

A. G. MATHER, *Appellant*, v. KING COUNTY, *Respondent*.¹

COUNTIES—COUNTY COMMISSIONERS—GRAND JURY—No AUTHORITY TO EMPLOY STENOGRAPHER FOR GRAND JURY. A grand jury being a distinct body with powers defined by statute, the county commissioners have no power to employ a stenographer for the grand jury, no such person other than one of their number, chosen as clerk under Bal. Code, § 6810, being eligible to attend the sessions.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 23, 1905, dismissing an

¹Reported in 82 Pac. 121.

action to recover for services as stenographer for the grand jury, upon sustaining a demurrer to the complaint. Affirmed.

Byers & Byers, for appellant.

Kenneth Mackintosh and Ernest B. Herald, for respondent.

MOUNT, C. J.—Plaintiff brought this action in the court below, alleging that he had been employed by the board of county commissioners of King county to act as stenographer for the grand jury; that, under such employment, he rendered services which were a necessary expense, and were reasonably worth \$477.51; that the board of county commissioners of said county audited, allowed, and paid his claim for such services for the month of January, 1903, amounting to the sum of \$211.40, but refused to allow for such services for the months of February and March, and rejected plaintiff's claim therefor, in the sum of \$266.10. The court below sustained a general demurrer to the complaint. Plaintiff elected to stand on the allegations of his complaint, and the action was dismissed. Plaintiff appeals.

Appellant contends that, under the general powers of the county commissioners, as defined by Bal. Code, § 342, "to allow all accounts legally chargeable against such county, not otherwise provided for, . . . to have the care of the county property, and the management of the county funds and business . . .," the county commissioners have a right to employ, and pay for the services of, a stenographer for the grand jury sitting in King county. It is not contended that there is any provision of law authorizing a stenographer for a grand jury, but appellant claims that such person is necessary for the dispatch of the business of that body, and that the county commissioners, under their general authority, have the right to employ one; and, having done so, must pay him out of the county funds. This, of course, depends upon the authority of the county commissioners to employ a stenographer for that purpose. If they have no authority to employ, they have no right

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to use the county funds to pay for one unlawfully employed.

The duties, powers, and officers of a grand jury are specifically defined by statute. That body exercises a judicial function in the administration of the criminal law, under the direction and advice of the judge of the superior court. The grand jury performs no service, directly or indirectly, necessary for the corporate objects or purposes of the county. It has no control over the officers of the county, and the board of commissioners, therefore, under their general authority, have no control over the affairs of the grand jury, and no authority to contract debts for the convenience of the grand jury. Both are distinct bodies, having well defined duties. The officers of a grand jury consist of a foreman, appointed by the superior judge, "and the jury may appoint one of their number as clerk to keep a minute of their proceedings." Bal. Code, § 6810. "The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses, and giving them such advice as they may ask." Bal. Code, § 6812. No other person is authorized by law to attend upon the sessions of the grand jury. The legislature, having provided for the officers of that body, it is not within the power of the county commissioners to provide other officers or employees. *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195.

The statute expressly says, "the jury may appoint one of their number as clerk to keep a minute of their proceedings." This clerk must be one of the jurors. No other person is eligible, and no other person can lawfully be in attendance upon the sessions of that body, by appointment of any power. Certainly, the county commissioners have no authority to provide stenographers or clerks for the grand jury. It is not alleged in the complaint that the plaintiff was a member of the grand jury. If he was not a member of that body, he had no right to act as clerk or stenographer at all. If he was a member, his pay as grand juror in-

cluded his labor as clerk, because no extra compensation is provided therefor.

Appellant contends that the services of stenographer were necessary for the proper dispatch of the business of the grand jury, and therefore such services should be paid for. This argument might properly be addressed to the legislature in behalf of a law authorizing such assistance for grand juries; but where there is no authority in law for such employment, and no provision for paying for such services as extra services, courts are powerless to give relief.

We conclude that the county commissioners of King county had no authority to employ or pay for a stenographer for a grand jury. The judgment of the lower court is therefore affirmed.

FULLERTON, RUDKIN, CROW, and HADLEY, JJ., concur.

(No. 5482. Decided May 26, 1905.)

WILLIAM CLARK *et al.*, Appellants, v. CHARLES S. ELTINGE
et al., Respondents.¹

COSTS—TAXATION—AFFIDAVIT—BURDEN OF PROOF. Where a cost bill is verified in substantially the language of the statute and served within ten days after the filing of the opinion, the burden of proof will be on the opposite party to disprove the allegations thereof.

SAME—FOR TRANSCRIPT. No costs for transcript, in excess of the amount paid to the clerk of the superior court therefor, can be recovered.

SAME—FOR PRINTING BRIEFS. Where the cost bill does not show that the amount paid for printing briefs was "actually and necessarily" paid, only 75 cents per page will be allowed.

SAME—FOLIOS. Ten cents per folio is the maximum amount that may be recovered for a statement of facts.

SAME—SERVICE OF COST BILL. Where there is no proof of service, a cost bill will be disregarded.

¹Not yet reported in Pacific Reporter.

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Opinion of Clerk on Costs.

Exceptions to the taxation of costs by the clerk of the supreme court, on the reversal of a judgment of the superior court for Spokane county. Denied.

B. C. Mosby, for appellants.

William T. Stoll and *B. B. Adams*, for respondents.

OPINION OF CLERK ON TAXATION OF COSTS.

On the 18th day of April, 1905, the court filed its opinion in this case (38 Wash. 376, 80 Pac. 556) reversing the judgment of the lower court, and, within the ten days thereafter allowed by the rules of court, the appellants served and filed their cost bill, in substantially the following words, omitting the title of the cause:

"Transcript	\$ 35.00
Statement of Facts	81.00
Opening Brief	45.00
Expressage	.75
Reply Brief	28.50
Expressage	.35
Docket Fee	5.00
Attorney's Fee	25.00
Total	\$220.60

"STATE OF WASHINGTON, COUNTY OF SPOKANE, ss:

"I, B. C. Mosby, first being duly sworn, say that I am the attorney for the appellants in the above-entitled action, and that the foregoing is a true bill of costs and disbursements incurred on the appeal of the said cause. B. C. Mosby.

"Subscribed and sworn to before me this 25th day of April, 1905. F. L. Taylor, Notary Public in and for the State of Washington, residing at Spokane, Washington. Seal of F. L. Taylor."

Subsequently and within ten days after the service upon them of the cost bill, the respondents served and filed their exceptions thereto, fully raising the issue as to the sufficiency of the allegations of the cost bill to entitle the appellants to recover thereon.

Rule xiv of the supreme court is as follows:

"RULE xiv. Cost Bills. — (1) The prevailing party shall, within ten days after the filing of the opinion in a case, file with the clerk a cost bill, and serve upon the adverse party a copy thereof. If any adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the clerk of the court within ten days after service of the cost bill upon him. Whereupon the clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the clerk within ten days after such taxation. Said exceptions shall be heard by the court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

"(2) If no cost bill is filed and served, the clerk will tax as costs only the clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney fee, and the cost of transcript at the rate of five cents a folio.

"(3) Where a cost bill has been served and filed in time, and no exceptions thereto filed, objection thereto will be deemed to have been waived."

It therefore becomes the duty of the clerk at this time to tax the costs to which, in his judgment, the prevailing party is entitled, subject to an appeal to the court as provided above, and notify counsel thereof. Heretofore, it has not been the general practice of the clerk to assign any reason for his conclusions, and where exceptions have been taken to the rulings of the clerk, the court has very rarely filed an opinion in passing upon them, hence I have thought it advisable to depart from the customary practice this once, and give the bar generally the benefit of my conclusions. Costs are allowed strictly in pursuance of the statutes, and

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Opinion of Clerk on Costs.

unless some statutory authority therefor is found, no costs at all can be allowed, and presumptions cannot be indulged in favor of a party claiming costs.

Bal. Code, § 6528, is the provision under which costs in civil actions are allowed in the supreme court, and is as follows:

"Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When in the opinion of the supreme court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same."

The first item excepted to is "Transcript \$35." It does not appear from the cost bill or from the affidavit thereto, that this item constituted the clerk's fees for preparing, certifying and sending up the record. The transcript might have been prepared from office files, in which event the clerk would only be required to compare it with the records of his office and certify to it, for which the law authorizes him to make a charge of five cents a folio. It is true the transcript may have cost the prevailing party the sum charged, but under

the statute they may only recover the amount paid the clerk, and as they make no claim to having paid the clerk any sum, I am of the opinion that they are only entitled to the sum of five cents per folio therefor, which by careful computation we find to be \$16.95.

The next item is printing briefs. The statute allows the necessary disbursements for the printing of briefs, and in my judgment the affidavit to the cost bill should show that the amount paid was "necessarily paid" and, that fact not appearing in the affidavit, the statute has not, in my opinion, been sufficiently complied with, to entitle the appellants to recover thereunder. I have therefore allowed 75 cents per page as provided by the rules, where no cost bill is filed, amounting to \$71.25.

No provision either in the statute or rules is made for the recovery of express charges, hence those items are disallowed.

Statement of facts.—The statute reads, "any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts." It is much more difficult in this instance to determine just what the legislature meant, but in my judgment it meant such parts of the evidence as could not be made a part of the record without transcribing, such as the oral testimony of witnesses, etc., and did not include copies of documents which were received as exhibits and filed in the case. I think the statute might also be construed to include copies of public records which from their nature, and the inconvenience to the public, could not be spared by their respective custodians. The statute requires copies of the proposed statement of facts to be served upon the adverse party, but the maximum amount that can be recovered for the statement is ten cents per folio, and no provision is made for a recovery for the copies.

In this case the respondents filed the affidavit of the stenographer to the effect that the statement of facts contained

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not to exceed 405 folios and that he made the same at the instance of the appellants. I am inclined to the opinion, that there is a sufficient showing to entitle the appellants to recover at the rate of ten cents per folio therefor, or \$40.50.

Respondents also except to the transcript as containing "irrelevant, redundant and immaterial matter" not necessary nor used by the court in determining the issues. This may be true, but as the irrelevant and redundant matter is not pointed out, the clerk will not attempt to go over the entire case simply for the purpose of determining what, if any, part of the record is irrelevant and redundant. That exception is therefore overruled.

Attorneys filing exceptions to cost bills should bear in mind that, if they raise a question of fact by their exceptions, the burden of proof is upon them. This may seem to be a little incongruous in view of the fact that the costs are in the nature of an original, unliquidated claim against the opposite party. But it seems to me that it would be decidedly impractical to adopt any other course. While there seems to be no provision of the statutes requiring the cost bills in the supreme court to be verified, manifestly they should be verified, otherwise an exception, to some statement in the cost bill, which is verified, would necessarily control. The practice, therefore, is that upon serving and filing a cost bill verified, substantially in the language of the statute, within ten days from the filing of the opinion, a *prima facie* case is made, which must be overcome by proof of the party excepting thereto.

C. S. REINHART,
Clerk.

PER CURIAM.—Ordered that the motion to retax costs in this cause be and the same is hereby denied.

30 702
Cm 1
220 702

(No. 5675. Decided May 15, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. N. A. HARRIS, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Neal, J., entered September 7, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Affirmed.

John R. Parker and *E. J. Brown*, for appellant.

Kenneth Mackintosh and *Samuel R. Stern*, for respondent.

PER CURIAM.—Appellant was prosecuted upon an information charging him with the crime of practicing dentistry without a license, in that he did treat a disease and lesion of the human teeth, and did correct a malposition of the human teeth and jaws, of one W. H. Beebe, in violation of the provisions of the dental laws of chapter 152, Laws of 1901. From a judgment of conviction, he appeals to this court.

The only question raised upon this appeal is the validity of the said dental law. The constitutionality of this law has been sustained by this court in *State ex rel. Smith v. Board of Dental Examiners*, 31 Pac. 492, 72 Pac. 110; *In Re Thompson*, 36 Wash. 377, 78 Pac. 899, and many subsequent cases. In consideration of these many decisions, this court is constrained to refuse to enter again upon the consideration of the question presented.

The judgment of the trial court is affirmed.

(No. 5676. Decided May 15, 1905.)

THE STATE OF WASHINGTON, *Respondent*, v. H. C. LITTOOY, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Neal, J., entered September 7, 1904, upon a trial and conviction of the offense of practicing dentistry without a license. Affirmed.

John R. Parker and *E. J. Brown*, for appellant.

Kenneth Mackintosh and *Samuel R. Stern*, for respondent.

PER CURIAM.—For the reasons assigned in *State v. Harris*, ante, p. 702, 80 Pac. 1135 (just decided), the judgment of the lower court in this case is affirmed.

¹Reported in 80 Pac. 1135.

July 1905]

Opinion Per Curiam.

(No. 5273. Decided July 14, 1905.)

A. E. GREENUS *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.¹

Appeal from a judgment of the superior court for King county, Bell, J., entered March 28, 1904, in favor of the city, upon excluding all evidence offered, dismissing an appeal from a city council's levy of a special assessment. Reversed.

McClure & McClure, for appellants.

Mitchell Gilliam, Hugh A. Tait, and Wm. Parmerlee (James B. Howe, of counsel), for respondent.

PER CURIAM.—This appeal involves the same question discussed by this court in *Ahrens v. Seattle*, *ante*, p. 168, decided July 14th, 1905; and for the reasons there assigned the cause is remanded to the superior court, with instructions to vacate the judgment confirming the assessment roll, and then proceed to a full trial and judgment upon all questions of law and fact involved in the objections to the assessment, permitting the formal introduction of testimony and hearing and determining the case as is done in equity causes. Appellants shall recover their costs on this appeal.

(No. 5224. Decided July 14, 1905.)

FRED RICE ROWELL, *by Ida M. Crosbie (substituted), Administratrix, et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.¹

Appeal from a judgment of the superior court for King county, Bell, J., entered March 28, 1904, in favor of the city, upon excluding all evidence offered, dismissing an appeal from a city council's levy of a special assessment. Reversed.

Walter B. Beals and Oliver Anderson, for appellants.

Mitchell Gilliam, Hugh A. Tait, and Wm. Parmerlee (James B. Howe, of counsel), for respondent.

PER CURIAM.—This appeal involves the same question discussed by this court in *Ahrens v. Seattle*, *ante*, p. 168, decided July 14th, 1905; and for the reasons there assigned the cause is remanded to the superior court, with instructions to vacate the judgment confirming the assessment roll, and then proceed to a full trial and judgment upon all questions of law and fact involved in the objections to the assessment, permitting the formal introduction of testimony and hearing and determining the case as is done in equity causes. Appellants shall recover their costs on this appeal.

¹Reported in 81 Pac. 560.

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29. APPEAL — REVIEW — ERROR FAVORABLE TO APPELLANT — TRIAL — INSTRUCTIONS. The giving of an erroneous instruction, favorable to the appellant, is not prejudicial error although it conflicts with other correct instructions. *Id.*..... 271
30. APPEAL—INSTRUCTIONS—HARMLESS ERROR—COMPROMISE AND SETTLEMENT. No prejudice can result from an instruction to find for the appellant if the jury find that a "full and fair" settlement was made, when the fairness of the settlement was in no way questioned. *Irvine v. Buffalo Pitts Co.*..... 346
31. APPEAL—REVIEW—INSTRUCTIONS—ERROR CURED. It is not error to refuse a requested instruction that is substantially given in the general charge. *McKnight v. Seattle*..... 516
32. APPEAL—REVIEW—EVIDENCE—CONCLUSION—HARMLESS ERROR. The admission of evidence objected to on the ground that it is a mere conclusion of the witness is harmless where the witness had previously given substantially the same testimony without objection. *Hart v. Cascade Timber Co.*..... 279
33. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In a case tried *de novo* on appeal, incompetent evidence will be disregarded and its admission is not ground for reversal. *Krisch v. Inter-State Fisheries Co.*..... 381

APPEAL AND ERROR—CONTINUED.

34. **APPEAL—REVIEW—HARMLESS ERROR ON TRIAL DE NOVO.** In an action tried without a jury, error cannot be assigned upon the reception and exclusion of evidence, where it is not made to appear that the findings were based upon incompetent evidence or that evidence was wrongfully excluded. *Carstens & Earles v. Hine*.... 498
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37. **APPEAL AND ERROR—REVIEW—TRIAL—COMMENTS—HARMLESS ERROR.** Comments of the court as to the incompetency of letters, at the time of properly excluding them, is not prejudicial error. *Irwin v. Buffalo Pitts Co.*..... 346
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XI. DETERMINATION AND DISPOSITION OF CAUSE.

Effect of affirmance, see MANDAMUS, 3.

39. **APPEAL—DECISION—REMITTING EXCESS.** Upon reversing a case for error in including an item of damages fixed by special verdict, the judgment will be allowed to stand if the erroneous item is remitted. *Nickelson v. Cameron Lumber Co.*..... 563
40. **APPEAL AND ERROR—DECISION—DAMAGES—REMITTING AMOUNT ERRONEOUSLY INCLUDED.** Where the amount of special damages improperly included in the verdict can be ascertained from the evidence, the judgment may be affirmed upon the condition that the excess be remitted. *Stowe v. La Conner Trad. & Transp. Co.*..... 28
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Upon reversing an order of the superior court, confirming a municipal assessment, for error in excluding all evidence offered, the supreme court is not confined to a correction of the assessment roll, but will remand the case to the superior court for a full trial on the evidence. *Ahrens v. Seattle*..... 168
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50. **SAME—SUMMARY JUDGMENT BY AGREEMENT—SURPLUSAGE IN BOND.** A gratuitous clause in a statutory bond whereby the sureties agree to the entry of summary judgment against them, in case the appellant fails to pay the judgment within thirty days after the filing of the remittitur, is without legal force, and confers no right to such a judgment, the sureties being entitled to their day in court. *Id.*.. 256

APPEARANCE:

1. **APPEARANCE—SPECIAL—WAIVER.** A special appearance to dismiss an action because of a defective service of summons is waived by a general appearance made without preserving the special appearance. *Gaffner v. Johnson*..... 437

ARSON:

See **CRIMINAL LAW**, 1, 10, 15.

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EMINENT DOMAIN 1, 2.

Of damages, see **DAMAGES**.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 1-4.

Local improvement, review, remand, see **APPEAL AND ERROR**, 42.

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Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2, 7, 8.

ASSIGNMENTS:

For benefit of creditors, see **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.

Of bill of lading, see **CARRIERS**, 1-5.

Of note as collateral credit, see **MECHANICS' LIENS**, 2.

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS—GARNISHMENT OF ASSIGNEE—ANSWER—MOTION FOR JUDGMENT—AMENDMENT—CONSENT OF CREDITOR.** Upon a motion for judgment on the answer of a garnishee, which admitted that he held the property of the principal defendants as a trustee for the benefit of all the creditors under a written assignment, the answer, in the absence of demurrer or motion, should be treated as amended to allege that the assignment was made at the instance of the plaintiff, thereby precluding the plaintiff from attacking the assignment as fraudulent, and raising an issue of fact; hence judgment on the pleadings against the garnishee is erroneous, notwithstanding a reply by the plaintiff denying the plaintiff's consent to the assignment. *McAvoy v. Jennings*.. 109

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 2, 8-10, 17, 28.

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Exemptions, see **EXEMPTIONS**.

ATTORNEY AND CLIENT:

Admissions of attorney, see **EVIDENCE**, 1, 2.

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Argument and conduct of counsel at trial, see **TRIAL**, 4-6.

Dismissal upon opening statement of counsel, see **TRIAL**, 7.

BAILMENT:

See **CARRIERS**, 1-5.

BANKS AND BANKING:

1. **BANKS AND BANKING—NATIONAL BANK IN PROCESS OF LIQUIDATION—SUBSEQUENT TRANSFER OF STOCK—ENTRY ON BOOKS.** A national bank, in process of voluntary liquidation, cannot be compelled to enter subsequent transfers of stock on its books and issue new certificates thereof; since, under U. S. Rev. Stats., § 5220, its business is closed for all purposes except winding up its affairs, and a transferee of its stock is merely an equitable owner of an interest in the assets. *Muir v. Citizens Nat. Bank*..... 57

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See **ESTOPPEL**.

Of action by former adjudication, see **JUDGMENT**, 1, 2.

Of action by limitation, see **LIMITATION OF ACTIONS**.

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In criminal prosecutions, see **CRIMINAL LAW**, 11.

BILL OF LADING:

See **CARRIERS**, 1-4.

BILLS AND NOTES:

See **PLEADING**, 1.

1. **BILLS AND NOTES—DEFENSES—EVIDENCE.** The burden of proof is upon the defendant to establish by a clear preponderance of the evidence that, by a parol agreement, a promissory note was to become binding only upon the happening of a contingent event. *Ewell v. Turney*..... 615

BONDS:

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On appeal, construction, see **APPEAL AND ERROR**, 49, 50; Sufficiency, see **APPEAL AND ERROR**, 7, 8, 9, 50.

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Municipal bonds, see **MUNICIPAL CORPORATIONS**, 10-12.

School district bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 2, 3.

BOUNDARIES:

Mistake in, see **ADVERSE POSSESSION**, 4.

1. **BOUNDARIES—ADVERSE POSSESSION—DETERMINING DISPUTED BOUNDARY LINE.** A boundary line between two city lots may be determined by adverse possession for the statutory period, where the party purchased the lot inclosed by a fence including the twenty-one inches in dispute, immediately built a house thereon so close to the line that the drip from the eaves fell upon the strip of land in question, and resided thereon maintaining the fence in the same place and improving the disputed strip in the same manner as the balance of the lot, openly, continuously, and under a claim of right. *Erickson v. Murlin*..... 43

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BREACH:

Of contract, see **CARRIERS**, 1-5; **CONTRACTS**; **INDEMNITY**, 1-4; **SALES**, 5.
Of warranty, see **SALES**, 2 4.

BRIDGES:

Negligence, see **MUNICIPAL CORPORATIONS**, 5, 6.

BROKERS:

Action by agent for commissions, see **PRINCIPAL AND AGENT**, 2.

BUILDING CONTRACTS:

See **CONTRACTS**, 3-6; **INDEMNITY**, 1-4.

BUILDINGS.

Completion by owner, see **INDEMNITY**, 3.
Defects caused by specifications, see **CONTRACTS**, 3-6.
School buildings, see **SCHOOLS AND SCHOOL DISTRICTS**, 1, 4.

BURDEN OF PROOF:

Contributory negligence, see **MASTER AND SERVANT**, 25, 26.
To disprove verified cost bill, see **APPEAL AND ERROR**, 44.
Oral agreement varying note, see **BILLS AND NOTES**, 1.

BURGLARY:

Information, variance, see **CRIMINAL LAW**, 25.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see **SALES**, 1, 2; **VENDOR AND PURCHASER**, 6.
Setting aside tax deed, see **TAXATION**, 1.

CARRIERS:

1. **CARRIERS—CONTRACT OF CARRIAGE—CONSTRUCTION—DELIVERY AT SHIP'S TACKLE—SALE IN TRANSITU WITHOUT DELIVERY.** A shipping contract of a consignment of goods, to be delivered to the consignors or order "at ship's tackle," is intended to describe the place of delivery, and does not annex a condition to a contract of sale *in transitu* preventing a sale without such delivery. *Sweeney v. Waterhouse & Co.*..... 507
2. **SAME—BREACH OF CONTRACT OF CARRIAGE—ACTION FOR VALUE—DEFENSES—SALE OF GOODS BEFORE SUIT.** The consignors of goods to be delivered to self or order cannot, after a sale of the goods *in transitu* and a transfer of all their title, maintain an action upon the contract of carriage for the failure of the carrier to make delivery, where the value of the goods enters into the element of the recovery, since it is essential to such action that the beneficial interest in the property remain in the consignors. *Id.*..... 507

CARRIERS—CONTINUED.

3. SAME—FAILURE TO DELIVER—CONVERSION—ACTION BY CONSIGNORS—
DEFENSES—SALE IN TRANSITU AND TRANSFER OF TITLE—RIGHT OF AS-
SIGNEES. An action as for a conversion, for the failure of a carrier
to deliver goods shipped, cannot be maintained by the consignors of
goods to be delivered at a certain port to self or order, where the
consignors sold all the goods *in transitu*, and assigned and delivered
the bills of lading to the purchasers, before the arrival of the vessel,
who demanded and received a portion of the goods; since such sale
and assignment passed the title to the goods, and rendered the
carrier liable to the purchasers for failure to deliver. *Id.*..... 507
4. SAME—TRUSTS. Such action cannot be maintained by the con-
signors as trustees of an express trust, since they unconditionally
parted with title, especially when the suit is not prosecuted for the
benefit of the purchasers. *Id.*..... 507
5. CARRIERS—LOSS OF GOODS—JETTISON—ACTION BY CONSIGNOR. In
an action by a consignor for the loss of goods jettisoned at sea,
findings to the effect that the plaintiff was the consignor of the
goods, stating their value, that defendant received the goods as a
carrier, agreeing to deliver them to the consignees, and that de-
fendant threw the goods overboard into the sea to the plaintiff's
damage in a specified sum, are sufficient to sustain conclusions of
law and a judgment establishing defendant's liability for the loss.
Carstens v. Alaska Steamship Co...... 229
6. CARRIERS—DUTY TO PASSENGERS—DEGREE OF CARE—INSTRUCTIONS.
In an action by a passenger against a railroad company for injuries
sustained in a collision, it is proper to instruct that the railroad
company owed the duty to carry the plaintiff safely so far as human
care and skill would enable it to be done, and to use the utmost
vigilance and exercise the highest degree of prudence and caution
in running its trains so as to prevent injury; and a qualification
respecting the practical operation of the business is not essential.
Williams v. Spokane Falls etc. R. Co...... 77
7. SAME—CUSTOM OF OTHER ROADS. In such a case the duty of the
defendant is not measured by the degree of care customarily exer-
cised by other roads. *Id.*..... 77
8. CARRIERS—NEGLIGENCE—PRESUMPTION FROM FACT OF COLLISION.
There is a presumption of negligence upon the part of a railroad
company from the fact that a passenger's injury was due to an un-
explained disconnection of the coupler in switching cars on a side
track, causing a collision; since evidence that the injury was due
to the operation of the road makes out a *prima facie* case. *Id.*.. 77

CARRIERS—CONTINUED.

9. **SAME—COLLISION—DISCONNECTION OF COUPLER—EVIDENCE OF NEGLIGENCE—SUFFICIENCY.** In an action for personal injuries sustained through the colliding of cars being switched on a side track with a postal car standing thereon, there is sufficient evidence of defendant's negligence, where it appears that the accident was due to the fact that the cars became detached from the switch engine, and that the coupling had come apart several times before, to the knowledge of the company's servants, who threw off safety chains simply for the purpose of expediting the business. *Id.*..... 77
10. **SAME—LIABILITY OF OTHER PARTIES—INSTRUCTIONS.** In an action against the owner of a vessel for personal injuries sustained by a passenger in falling from a dock, an instruction to the effect that the plaintiff also had a cause of action against the owner of the dock, who was not a party to the suit, is properly refused. *Stowe v. La Conner Trad. & Transp. Co.*..... 28
11. **SAME—OWNERSHIP OF PREMISES.** In an action for personal injuries sustained in falling from a dock, cross-examination of a witness as to the ownership of the dock is properly excluded when foreign to the subject-matter of the testimony in chief. *Id.*..... 28

CAUSE OF ACTION:

See ACTION.

CAVEAT EMPTOR:

See CONTRACTS, 2; SALES, 1.

Purchase of corporate stock, see CORPORATIONS, 5.

CERTAINTY:

Information, see CRIMINAL LAW, 3, 6-8.

As to judgment of confinement, see INSANE PERSONS, 2.

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Bank stock, compelling issuance, see BANKS AND BANKING, 1.

CHALLENGE:

To juror, see JURY, 1.

CHARACTER:

Of accused in criminal prosecutions, see CRIMINAL LAW, 17.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES — FORECLOSURE — RECEIVERS—APPOINTMENT—EVIDENCE—SUFFICIENCY OF SHOWING.** In an action for the foreclosure of a chattel mortgage upon furniture, including a leasehold interest in a hotel, a receiver *pendente lite* is authorized by statute, and is properly granted, where it appears that the security is inadequate, the mortgagor insolvent, and the leasehold in danger of forfeiture through the mortgagor's refusal to pay the rent, and where the mortgagor refuses to apply rents received by him on the mortgage debt, admits that there is no defense on the merits, and manifests a disposition to delay the proceedings. *Euphrat v. Morrison*..... 311

CHILD:

See INFANTS.

Child labor, see MASTER AND SERVANT, 1, 20-23.

CITATION:

Removal of administrator, see EXECUTORS AND ADMINISTRATORS, 6.

CITIES:

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE:

See OFFICERS, 2, 3.

COLLISION:

See CARRIERS, 6-9.

1. COLLISION—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a finding that the master of a steamer was guilty of negligence in colliding with the steamer P, a rival boat, when it appeared that he was, at the time, in his pilot house with an unobstructed view of the P, which was running on a parallel course, two or three hundred feet in advance, that the water was smooth, and that under the rules of navigation the P had the right of way. *Gaffner v. Johnson*..... 437.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 1, 3.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONERS:

Capitol commission, powers, see STATES, 1.

Of public lands, powers, mandamus, see PUBLIC LANDS, 2; Lease of school lands, see PROHIBITION, 1, 2.

COMMISSION MERCHANTS:

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Of agents for sales, see PRINCIPAL AND AGENT, 2, 3.

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COMMON LAW:

Forms abolished, see MANDAMUS, 2.

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See DIVORCE, 3-5; EXECUTORS AND ADMINISTRATORS, 9; HUSBAND AND WIFE, 1, 2.

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CONTRACTORS:

Bonds, see INDEMNITY, 1-4, 6, 7.

CONTRACTS:

See COMPROMISE AND SETTLEMENT, 1; CONTRIBUTION, 1; VENDOR AND PURCHASER.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Defenses, see PLEADING, 3.

Impairment of obligation, see JUDGMENTS, 6-8.

Parties to, see PLEADING, 9.

Contracts of particular classes of parties: See CARRIERS, 1-5; FACTORS. With state, modification, see STATES, 1, 2.

Contracts relating to particular subjects: Building, delay, breach, see INDEMNITY, 3, 4. Carriage of goods, construction, see CARRIERS, 1. Cutting timber on public land, see CONTRIBUTION, 1. For unlawful expenditure of public money, see COUNTIES, 1.

Particular classes of contracts: See BILLS AND NOTES; INDEMNITY; SALES. Agency, see PRINCIPAL AND AGENT. Bills of lading, see CARRIERS, 1-5. Of employment of minor, see MASTER AND SERVANT, 20. Sales of realty, see VENDOR AND PURCHASER. To convey land, see FRAUDS, STATUTE OF, 1.

1. **CONTRACTS — LETTERS — ACCEPTANCE OF PROPOSALS — TIME OF DELIVERY NOT AGREED UPON.** Where a proposition by letter to furnish certain materials for a building did not specify the time for delivery, and the letter accepting the proposal fixed the time within which delivery must be made, whereupon a reply was mailed not accepting the time of delivery but stating that the other party would be advised of the time in which delivery could be made, and six days later the advice was given that the material could not be furnished within the time fixed, no contract was entered into. *Bringham v. American Bridge Co.*..... 3
2. **CONTRACTS—LEGALITY—CUTTING TIMBER ON PUBLIC LANDS—PUBLIC POLICY—NOTICE OF TITLE OF GOVERNMENT—CAVEAT EMPTOR—WAIVER OF OBJECTIONS—PLEADINGS—OBJECTIONS FIRST RAISED IN SUPREME COURT.** A defendant who scripped government land, and entered into a contract expressly reciting that it owned the lands, whereby the plaintiffs were employed to cut the timber therefrom, cannot, for the first time in the supreme court, set up the title of the government and the illegality of the contract as a defense to an action for breach of the contract, where the plaintiffs were not aware of defendant's want of title; since it was not incumbent upon them to investigate the title under the doctrine of caveat emptor, and violation of the law not being contemplated, the contract was not void on the ground of public policy, to the extent of requiring a court on its own motion to so declare, where the parties had failed in their pleadings to allege the illegality. *Cox v. Cameron Lumber Co.*..... 562

CONTRACTS—CONTINUED.

3. **CONTRACTS—BREACH—DEFECT IN BUILDING—SPECIFICATIONS AT FAULT.** In an action for the breach of a building contract, it is immaterial that the contractor drew up a clause in the specifications requiring tamping of concrete piers, which it is claimed by him caused the defects in the building, where the terms of the contract were not ambiguous, and there is no claim of fraud or overreaching. *Novelty Mill Co. v. Heinzerling*..... 244
4. **SAME—DEFECTS DUE TO PLAINTIFF'S SUPERINTENDENT—PRINCIPAL AND AGENT—PROOF OF AUTHORITY—DECLARATIONS OF AGENT.** In an action against a contractor for defects in a building constituting a breach of the contract, in which the defendant claims that the defects were caused by plaintiff's expert superintendent who daily directed the work, testimony of the superintendent concerning his orders and directions about the work, tending to establish his authority, is admissible in connection with proof that the secretary of the plaintiff was often present and heard the directions without denying his authority; and the question of his agency was for the jury. *Id.*..... 244
5. **CONTRACTS—BREACH—DEFECTS CREATED BY COMPLIANCE WITH CONTRACT—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.** In an action for damages for the breach of a building contract, evidence tending to show that the defect in the building was caused by tamping concrete piers in the manner required by the contract, and insisted upon by the plaintiff, and that defendant substantially complied with the contract, raises a question for the jury, precluding the direction of a verdict for plaintiff. *Id.*..... 244
6. **SAME—INSTRUCTIONS.** In such a case the contractor would not be liable for damages caused by tamping the concrete in the manner required by the contract, although it was faulty workmanship to tamp it, unless the jury find that he failed to do the tamping as it should have been done. *Id.*..... 244
7. **CONTRACTS—EVIDENCE—IMMATERIAL CONTINGENCIES.** An oral contract is to be proved by what is said and done, and objections to questions as to what a party would or might have done if the contract had not been as claimed are properly sustained. *Irwin v. Buffalo Pitts Co.*..... 346
8. **CONTRACTS—GRUBSTAKE—TRUST—ACCOUNTING—EVIDENCE—SUFFICIENCY.** In an action between brothers for an accounting and the transfer of stock, the evidence is sufficient to show that the defendant held a one-third interest in a mining claim in trust for the plaintiff, where it appears that the claim was located in defendant's name and development work done by plaintiff under a grubstake agreement in consideration of a one-third interest, that defendant accounted to plaintiff for one-third of receipts from partial sales, and wrote letters acknowledging the trust; and it is error to dismiss the action. *Mack v. Mack*..... 190

CONTRACTS—CONTINUED.

9. **SAME—STATUTE OF FRAUDS—AGREEMENT NOT IN WRITING.** A contract whereby defendant grubstaked the plaintiff, who did development work upon a mining claim, in consideration of a one-third interest therein, which interest the defendant agreed to hold in trust for him, is not within the statute of frauds and need not be in writing. *Id.*..... 190
10. **SAME—ACCOUNTING—TRUST—EXPENDITURES IN CARING FOR JOINT PROPERTY.** Where the locator of a mining claim held one-third thereof in trust for the plaintiff, in consideration of development work done, and subsequently expended money and time in caring for and managing the property, upon a sale of the property and an accounting, the trustee is entitled to one-third of the sum justly due for such disbursements and services, as a lien to be charged against the plaintiff's one-third interest in the proceeds. *Id.*..... 190

CONTRIBUTION:

1. **CONTRIBUTION — JOINT WRONG-DOERS — COMPROMISE OF PROSECUTION—LEGAL LIABILITY TO MAKE PAYMENT—CUTTING TIMBER ON GOVERNMENT LAND.** Where one employed to cut timber on lands supposed to belong to another is prosecuted for unlawfully cutting timber on government lands, and compromises the suit by the payment of \$2.50 per acre, under the act of June 3, 1878, he cannot recover from his employer the amount so paid; since, if guilty, there can be no contribution among wrong-doers; and if not guilty, he was under no legal liability to make the payment in compromise of the prosecution. *Cox v. Cameron Lumber Co.*..... 562

CONTRIBUTORY NEGLIGENCE:

- Of person injured on street, see **MUNICIPAL CORPORATIONS**, 9.
 Of person injured by street railroad, see **STREET RAILROADS**, 1.
 Of servant, see **MASTER AND SERVANT**, 9, 11-17, 25-28.

CONVERSATIONS:

- Evidence of, when competent, see **CONTRACTS**, 4; **CORPORATIONS**, 7.

CONVERSION:

- By assignor of bill of lading, see **CARRIERS**, 3.

CONVEYANCES:

- See **CHATTEL MORTGAGES**; **CORPORATIONS**, 1-3; **DEEDS**; **HUSBAND AND WIFE**, 1.
 Contracts to convey, see **VENDOR AND PURCHASER**, 2-6.

CORPORATIONS:

- See **MUNICIPAL CORPORATIONS**; **BANKS AND BANKING**.
 Acquisition of property by condemnation, see **EMINENT DOMAIN** 1-3.
 Public service corporations, see **EMINENT DOMAIN**, 3.

CORPORATIONS—CONTINUED.

1. CORPORATIONS — STOCKHOLDERS — ACTIONS — EQUITY—STOCKHOLDER PURCHASING STOCK FOR PURPOSE OF SUIT. A suit by a stockholder, to set aside a transfer of mining property and appoint a receiver for a corporation on the ground of fraud on the part of the trustees and the illegality of a stockholders' meeting ratifying the sale, is properly dismissed for want of equity, where allegations of the answer of the defendants stand confessed to the effect that plaintiff is not the real party in interest, but acquired certain stock for the sum of \$20, after the stockholders' meeting complained of, for the purpose of bringing the suit in the interest of antagonistic parties, for whom plaintiff is acting as trustee. *Breeze v. Lone Pine-Surprise etc. Min. Co* 602
2. CORPORATIONS—STOCKHOLDERS—ACTION TO RESTRAIN SALE AS ULTRA VIRES—PURCHASE OF STOCK FOR PURPOSE OF SUIT—INTEREST OF PLAINTIFF—ACTIONS—EQUITY. Where a few dollars are invested in the purchase of stock in a corporation, after the sale of all its assets, for the purpose of bringing a suit against the trustees to set aside the sale, which has been ratified by over ninety per cent of the stockholders, the purchaser has no such interest as to enable him to maintain an action in equity. *Pitcher v. Lone Pine-Surprise etc. Min. Co.*..... 608
3. SAME — SUIT BY MINORITY STOCKHOLDERS — SALE OF ALL ASSETS TO REORGANIZED CORPORATION—ULTRA VIRES—GOOD FAITH OF TRUSTEES —RATIFICATION. A sale of all the assets of a mining corporation to a reorganized company having the same trustees, for the purpose of raising money to pay a mortgage due to three of the trustees, who participated therein, and also for development work, is not *ultra vires* and void as to minority stockholders, where it appears that the corporation was justly indebted to the trustees, that its stock was nonassessable, and the new corporation was organized with assessable stock by the same trustees, and all stockholders were given an opportunity to exchange their stock on equal terms, the assessments to pay the indebtedness and raise money for development work; and where ninety-three per cent of the stockholders made the exchange and the sale was ratified at a stockholders' meeting, everything being done in good faith and for the best interest of the stockholders. *Id.*..... 608
4. CORPORATIONS—STOCK—RE-ISSUE—SALE BY CORPORATION—BENEFITS RECEIVED—ULTRA VIRES. Where a promoter subscribed for stock in a corporation, which was issued to him as fully paid up, upon a nominal consideration, and he donated it to the corporation, whose trustees authorized its sale, the corporation may sell and re-issue it as fully paid up to an innocent purchaser at 10 per cent of its par value, and after receiving the benefits of the sale, the defense of *ultra vires* is not available. *Krisch v. Inter-State Fisheries Co.*..... 381

CORPORATIONS—CONTINUED.

5. **SAME—FRAUD—SALE OF STOCK—FALSE REPRESENTATIONS—LACHES OF PURCHASER—MEANS OF INVESTIGATION NOT OPEN.** One who is induced to purchase stock in a corporation through the false representations of its treasurer as to its assets, debts, and business, is not, as a matter of law, chargeable with notice of the fraud, nor guilty of laches in failing to discover it during three months service with the corporation, where the means of information were not open to him, but were fraudulently operated by the corporation, and its chief business was to make fraudulent sales of its own stock. *Id.* 381
6. **CORPORATIONS—LIABILITY FOR MALICIOUS PROSECUTIONS—ACTS OF GENERAL MANAGER IN INSTITUTING CRIMINAL SUIT—PAYMENT OF EXPENSES—EVIDENCE OF AUTHORITY—SUFFICIENCY.** A general manager of a corporation renders his company civilly liable for a malicious prosecution, where it appears that he was the statutory agent and only officer of the corporation in Idaho, that he prosecuted the criminal charge in question, maliciously and without probable cause, and to gain possession of government lands for the corporation, from which it then cut and removed the timber, that the corporation paid witness fees and employed a private counsel in the criminal case, and that the officers of the company declined to prevent the prosecution because, as stated, the manager had full control of the company's business in that state. *Nickelson v. Cameron Lumber Co.*..... 569
7. **SAME—KNOWLEDGE OF SUIT—EVIDENCE OF CONVERSATIONS WITH OFFICERS.** In an action against a corporation for a malicious prosecution, testimony of a conversation with its officers relative to the suit is admissible to show the company's knowledge of the suit, and of the agency through which it was instituted. *Id.*..... 569

COSTS:

On appeal, see **APPEAL AND ERROR, 9, 43-48.**

Cost bill, verification, service, proof, see **APPEAL AND ERROR, 44, 48.**

Of defending suit, indemnity bond, see **INDEMNITY, 5.**

1. **COSTS—JURY FEE—WAIVER OF JURY AFTER PAYMENT.** It is proper to tax as costs the advance jury fee paid by the prevailing party prior to a stipulation to waive a jury trial. *Lilly v. Lilly, Bogardus & Co.*..... 337

CO-TENANCY:

See **TENANCY IN COMMON.**

COUNCIL:

Discretion in levying taxes, see **MUNICIPAL CORPORATIONS, 12.**

COUNTIES:

Fees of officers, see **STATUTES**, 1.

Jurisdiction for administration of estate, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

1. **COUNTIES—COUNTY COMMISSIONERS—GRAND JURY—NO AUTHORITY TO EMPLOY STENOGRAPHER FOR GRAND JURY.** A grand jury being a distinct body with powers defined by statute, the county commissioners have no power to employ a stenographer for the grand jury, no such person other than one of their number, chosen as clerk under Bal. Code, § 6810 being eligible to attend the sessions. *Mather v. King County*..... 693

COUNTY COMMISSIONERS:

Powers, see **COUNTIES**, 1.

COURTS:

Contempt of court, see **CONTEMPT**.

Review of decisions, see **APPEAL AND ERROR**, 18-38.

Dismissal of appeal, judgment in lower court on bond, see **APPEAL AND ERROR**, 49, 50.

Removal of officers, power of review, see **OFFICERS**, 2, 3.

Supreme court, original jurisdiction, see **PROHIBITION**, 1, 2.

1. **COURTS—JURISDICTION—PROCESS—ORDERS FORBIDDING PAYMENT OF COURT STENOGRAPHER.** An order of the superior court, not made in any action or proceeding, and without pleading or process, forbidding the payment of county warrants for stenographer's fees in cases pending in such court, is void. *State ex rel Martin v. Pendergast*..... 132

CREDIBILITY:

Of witnesses, see **WITNESSES**, 5.

CREDITORS:

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.

Subrogation to rights of creditor, see **SUBROGATION**.

CRIMINAL LAW:

See **CONTEMPT**; **WITNESSES**.

Compelling officers to prosecute, see **MANDAMUS**, 1.

Cutting timber on public land, see **CONTRIBUTION**, 1.

I. INFORMATION AND DEFINITIONS.

For burglary, variance, see **CRIMINAL LAW**, 25.

1. **CRIMINAL LAW—JOINT COMPLAINT AGAINST HUSBAND AND WIFE—CONSPIRACY—ARSON—INFORMATION—SUFFICIENCY.** The information charging the defendant with aiding and abetting his wife in the commission of arson, is not insufficient in that it attempts to charge a conspiracy by a husband and wife, since it charges a consummated offense and not a conspiracy to commit an offense. *State v. Mann*..... 144

CRIMINAL LAW—CONTINUED.

2. **CRIMINAL LAW—ADULTERY—INFORMATION—ERRONEOUS DESIGNATION OF OFFENSE—LIVING IN A STATE OF ADULTERY.** An information plainly charging the offense of living in a state of adultery, is not defective on account of a recitation erroneously designating the offense as the crime of adultery, which is not punishable under our statutes. *State v. Nelson*..... 221
3. **SAME—CERTAINTY.** An information is not uncertain in that it may charge the offenses of adultery, living in a state of adultery, cohabitation, or lewdness, when the intent to charge the offense of living in a state of adultery is plain to a person of common understanding. *Id.*..... 221
4. **SAME.** Such an information is not bad for duplicity. *Id.*... 221
5. **SAME—PARTIES DEFENDANT.** In a prosecution for living in a state of adultery, it is not necessary to join the alleged paramour as a defendant. *Id.*..... 221
6. **SAME—CERTAINTY AS TO TIME.** An information for living in a state of adultery, charging the commission of the crime between certain dates, is not uncertain as to time. *Id.*..... 221
7. **CRIMINAL LAW—INFORMATION—CERTAINTY—DATE OF OFFENSE—VARIANCE—RAPE.** Under an information charging the commission of rape on a certain day, it is not a variance to prove that it occurred on a Sunday, one or two weeks prior thereto, the allegation as to time being immaterial except to fix a date within the period of the limitation of the statute; and such an information is not uncertain as to the crime charged. *State v. Osborne*..... 548
8. **SAME—UNCERTAINTY AS TO DATE—SEVERAL OFFENSES—ELECTION.** Under an information charging the commission of a rape on a certain day, no prejudice results from the fact that the evidence of the prosecuting witness showed a series of acts prior to the day named, each constituting the offense, but none on that day, when the prosecuting attorney was required to make an election as to which of the acts he would rely upon for a conviction, and the jury were instructed to acquit unless the accused was found to be guilty of such act. *Id.*..... 548
9. **CRIMES—CORRECTION OF MALPOSITION OF THE JAWS—WHAT CONSTITUTES.** The taking of an impression of jaws for the purpose of making false teeth and the fitting and adjustment of the same, constitutes a "correction of malposition of the jaws," within the statute requiring a license for the practice of dentistry. *State v. Newton*..... 491

II. EVIDENCE.

10. **CRIMINAL LAW—ARSON—EVIDENCE—SHIPPING GOODS FROM BUILDING—TIME—RE MOTENESS.** Upon a prosecution for arson, evidence that the accused shipped merchandise from the building, five and seven days before the fire, is admissible to show motive and to connect the accused with the crime, its remoteness in point of time only lessening its force. *State v. Mann*..... 144

CRIMINAL LAW—CONTINUED.

11. EVIDENCE—BEST AND SECONDARY. Oral evidence of the contents of an insurance policy is admissible when the policy is in the possession of the accused and on demand he fails to produce it, although the witness made a record of its contents and was compelled to refer thereto to refresh his memory. *Id.*..... 144
12. TRIAL—EVIDENCE—CROSS-EXAMINATION OF WITNESS. It is improper to ask upon cross-examination if the witness is not the "notorious R who was tarred and feathered at G." *Id.*..... 144
13. CRIMINAL LAW—EVIDENCE—ADMISSIONS—VOLUNTARY. Evidence of admissions made by the accused to officers while in custody are admissible without a direct statement that they were not made under the influence of fear produced by threats, when it appears from all that occurred that they were voluntarily made. *Id.*... 144
14. CRIMINAL LAW—EVIDENCE—ADMISSIONS—CONSPIRACY. Upon a prosecution of a husband and wife for a consummated offense of arson, admissions of the wife, implicating the husband, are not objectionable as an admission of one conspirator made after the conspiracy is at an end, since the rules relating to conspiracy have no application. *Id.*..... 144
15. SAME—PRINCIPAL AND ACCESSORY—ADMISSIONS—BY PRINCIPAL. In a separate prosecution of a husband as accessory to the crime of arson committed by his wife, admissions made by the wife implicating him are admissible in evidence, if they would have been competent against her, since it is incumbent on the state to prove her guilt. *Id.*..... 144
16. SAME—HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS. Such admissions are not objectionable as permitting the wife to testify against the husband, voluntary confessions not being within the rule of privileged communications. *Id.*..... 144
17. CRIMINAL LAW—HOMICIDE—INSANITY—EVIDENCE—PREVIOUS ENCOUNTER—REBUTTAL TESTIMONY REFLECTING ON CHARACTER—OBJECTIONS. In a prosecution for murder, where the testimony of the accused supports a plea of insanity, superinduced by a blow on the head received six months previously in an encounter with a third person, evidence in rebuttal, offered to show the nature and extent of such injuries, is not objectionable as tending to prove the bad character of the accused, although unnecessary details of the trouble were received in evidence under one general objection that it was not proper rebuttal; since the evidence was strictly in rebuttal and competent for the purpose offered. *State v. McPhail.*..... 199
18. SAME—EVIDENCE OF MANSLAUGHTER—DEFENSE OF INSANITY. In a prosecution for murder in the first degree, there is no evidence that the accused was guilty of manslaughter, as defined by the statute, where it appears that he had ill feeling and had made threats against deceased, a rival in business, and after being in his place

CRIMINAL LAW—CONTINUED.

- over an hour, without any apparent provocation, shot deceased in the back, inflicting a mortal wound, there being no defense except insanity. *Id.*..... 199
19. CRIMES—ADULTERY—EVIDENCE OF PREVIOUS ACTS. In a prosecution for living in a state of adultery, the conduct of the parties previous to the date charged may be shown. *State v. Nelson*..... 221
20. SAME—MARRIAGE OF PARAMOUR—HARMLESS ERROR. In a prosecution for living in a state of adultery, the state has a right to prove the marriage of the alleged paramour and the absence of her husband, as part of the surrounding circumstances; and if the marriage was immaterial, it was not prejudicial. *Id.*..... 221
21. SAME—ADULTERY OF PARAMOUR—BIRTH OF CHILD—HARMLESS ERROR. In a prosecution for living in a state of adultery with a married woman, it is competent for the state to prove that she gave birth to a child more than twenty months after she had seen or cohabited with her husband, as one step toward proving the ultimate fact of adultery with the accused; and if he was not connected therewith he was not prejudiced. *Id.*..... 221
22. SAME—MARRIAGE—EVIDENCE OF—COMPETENCY. Testimony tending to show a marriage by a minister of the gospel, that the parties then promised to take each other as husband and wife, and continually lived together and held themselves out as such, is competent proof of a marriage; the statutory provision for proof by certificate being cumulative. *Id.*..... 221
23. CRIMINAL LAW—ORDERS—RECITALS—COPY OF INFORMATION. An order of arraignment reciting the delivery of a copy of the information cannot be contradicted by *ex parte* affidavits. *Id.*..... 221
24. CRIMINAL LAW—PRACTICING DENTISTRY WITHOUT LICENSE—COMMISSION OF OFFENSE WITHIN ONE YEAR—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION—APPEAL—REVIEW—NEW TRIAL. A conviction for practicing dentistry without a license should be set aside as unwarranted by the testimony and against the overwhelming weight of the evidence, and a new trial should be ordered, where the unsupported evidence of the prosecuting witness was that it occurred at a certain office in Seattle in July, and the evidence of the defendant and of numerous witnesses was to the effect that defendant was not employed in that office in July, but had removed in June to Everett, and was practicing dentistry there during July, the burden being upon the prosecution to prove the commission of the offense within one year (FULLERTON, J., dissenting). *State v. Newton*..... 491
25. CRIMINAL LAW—BURGLARY—INFORMATION—VARIANCE. It is not a material variance that an information charged the burglary of the residence of F "situated and numbered 1206, S avenue," and the proof showed that F occupied apartment No. 14 of a building the common entrance to which was number 1206, S Avenue. *State v. Cox*..... 345

CRIMINAL LAW—CONTINUED.

III. TRIAL—INSTRUCTIONS.

Insanity, see INSANE PERSONS, 1.

Malicious prosecution, see CORPORATIONS, 6, 7.

26. CRIMINAL LAW—TRIAL—WITNESSES—EXCLUSION OF CODEFENDANT FROM ROOM. The exclusion from the court room of one jointly informed against with defendant, together with all other witnesses whose names were indorsed as witnesses for the state, is not prejudicial error, where, upon the conclusion of the opening statement of the prosecuting attorney, such codefendant was permitted to return and remained throughout the trial, and there is no claim that prejudice resulted. *State v. Mann*..... 144
27. TRIAL—COMMENT ON EVIDENCE. It is not unlawful comment on the evidence, within the meaning of the constitution, for the trial judge, upon ruling on the admissions of evidence, to reply to suggestions of counsel, respecting the value of reputation, that it may be lost in a minute. *Id.*..... 144
28. CRIMINAL LAW.—TRIAL—UNLAWFUL COMMENT ON THE FACTS—CROSS-EXAMINATION BY TRIAL JUDGE. It is unlawful comment on the facts, within the meaning of the constitution, for the trial judge in a criminal case to cross-examine the accused, asking leading questions calculated to discredit the witness, and clearly conveying the idea to the jury that, in the opinion of the court, the accused is guilty and his defense not *bona fide*. *State v. De Pasquale*.... 260
29. CRIMINAL LAW—TRIAL—INSTRUCTIONS—PROVINCE OF JURY—SPECIFIC REQUEST. An instruction that the jury are judges of the credibility of the witnesses and the weight of the evidence, is proper and sufficient, in the absence of any specific request for an instruction that they are the "sole judges of the facts." *State v. McPhail*.. 199
30. SAME—INSTRUCTIONS—TRIAL—WITHDRAWAL OF ISSUE AS TO LESSEER DEGREE OF OFFENSE—COMMENT ON FACTS—WANT OF EVIDENCE. In a prosecution for murder in the first degree, an instruction to the jury that there is no evidence in the case to support a verdict of manslaughter, is not an unlawful comment on the facts, in violation of Const. art. 4, § 16; since the determination of the issues raised in a cause, and whether there is any evidence in support thereof, are questions of law and not of fact. *Id.*..... 199
31. SAME—INSTRUCTIONS AS TO MANSLAUGHTER ON PROSECUTION FOR MURDER—NO EVIDENCE OF LESSEER OFFENSE. In a prosecution for murder in the first degree, the court is not required to give any instructions upon the lesser offense of manslaughter, where there is no evidence on which to base such an instruction. *Id.*..... 199
32. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of a letter in evidence is harmless, when its contents had been previously testified to without objection. *Stae v. Mann*..... 144

CRIMINAL LAW—CONTINUED.

33. **APPEAL—REVIEW—VERDICT.** The weight and credibility of the evidence is entirely for the jury and trial judge, and their decision is conclusive on the supreme court. *Id.*..... 144
34. **CRIMINAL LAW—APPEAL—REVIEW OF VERDICT.** A verdict of guilty in a criminal case against the overwhelming weight of the evidence may be set aside on appeal where it does not subserve the ends of justice. *State v. Newton*..... 491

CROSS-EXAMINATION:

- See **CRIMINAL LAW**, 12, 28.
- Personal injuries, see **DAMAGES**, 9; **CARRIERS**, 11.
- Of witnesses, see **WITNESSES**, 5.

CRUEL PUNISHMENT:

- See **CONSTITUTIONAL LAW**, 1.

CRUELTY:

- Ground for divorce, see **DIVORCE**, 2.

CUSTODY:

- Of child, see **DIVORCE**, 3, 5, 6.

CUSTOMS AND USAGES:

- As measuring duty of carrier, see **CARRIERS**, 7.

DAMAGES:

- See **DEATH**, 1; **NUISANCE**, 1.
- Breach of contract of carriage, see **CARRIERS**, 1-5.
- Breach by seller of contract for sale of goods, see **SALES**, 5.
- Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 1, 2.
- For destruction of fish traps, see **WATERS**, 4, 5.
- For cutting timber, see **PUBLIC LANDS**, 3.
- For negligence of factor, see **FACTORS**, 1.
- On part performance of oral agreement, see **FRAUDS, STATUTE OF**, 2.
- Remitting erroneous item, see **APPEAL AND ERROR**, 39-41.
1. **DAMAGES—MEASURE OF—LOSS OF TIME—VALUE.** In an action for personal injuries, it is competent to prove the reasonable compensation of a man engaged in ordinary labor in the business engaged in by the plaintiff. *Stowe v. La Conner Trad. & Transp. Co.*..... 28
2. **DAMAGES—FUTURE PAIN AND SUFFERING—PERMANENT INJURY—INSTRUCTIONS.** Future pain and suffering from the mangling of a hand is a matter of such common knowledge that a recovery therefor is warranted without evidence thereof aside from the injury itself. *Kirkham v. Wheeler-Osgood Co.*..... 415

DAMAGES—CONTINUED.

3. SAME—DAMAGES—INJURY CAUSING LOSS OF TIME—NO EVIDENCE OF VALUE OF TIME—INSTRUCTIONS—NECESSITY OF REQUEST. A charge allowing damages for loss of time during a disability occasioned by the loss of a thumb, where the evidence showed incapacity to work for six weeks, but did not show the value of plaintiff's time; is not prejudicial error, where it appeared that the plaintiff was capable of and had been operating a trim saw for a living, especially in the absence of any request for different instructions. *Prior v. Eggert*..... 481
4. DAMAGES—EXCESSIVE. A verdict for \$830 damages for the loss of a thumb, cut off at the first joint, and for six weeks loss of time, is not excessive. *Id.*..... 481
5. DAMAGES FOR PERSONAL INJURIES—WHEN NOT EXCESSIVE. In an action for personal injuries sustained through the bite of a vicious dog, a judgment for \$3,000 will not be reversed as excessive, where the plaintiff was confined to his bed for seven weeks, and suffered much pain, and at the trial, three months after the injury, his leg was stiff and the wound still a running sore, and where the jury returned a verdict for \$4,000, which was reduced by the trial judge. *Grissom v. Hofus*..... 51
6. DAMAGES—EXCESSIVE VERDICT—REDUCTION. A verdict for \$5,000 damages for personal injuries sustained by a logger who was caught between a log and a car and both of his thighs broken, is excessive and should be reduced to \$3,500, where it appears that he had substantially recovered, and would sustain no permanent injury impairing his earning ability, and that \$1,500 would fully compensate him for his loss of wages, and where no claim is made for medical attendance. *Hart v. Cascade Timber Co.*..... 279
7. DAMAGES—EXCESSIVE VERDICT—REDUCTION. A verdict for \$8,000 damages for personal injuries sustained in a fall from a temporary sidewalk is excessive, where it appears that the plaintiff, a woman forty-three years of age, engaged in keeping boarders and capable of earning from \$60 to \$90 per month, received a serious fall, but was able to walk several blocks and do some shopping, that she was confined for six weeks and incurred \$250 expense for medical attendance, that the permanent injury principally relied upon was aggravation of Bright's disease and other ailments previously existing, and there was much evidence of experts indicating that this was not attributable to the fall; and in such case passion or prejudice is established without other evidence, and the verdict should be reduced to \$4,000. *Shaw v. Seattle*..... 590
8. DAMAGES—SPECIAL—ALLEGATION OF—SUFFICIENCY—PERSONAL INJURIES—SERVICES OF WIFE AS NURSE. In an action for personal injuries, the value of a wife's services as a nurse cannot be recovered

DAMAGES—CONTINUED.

unless specially pleaded, and evidence thereof is incompetent under an allegation of damages for expenses incurred for medicines and medical treatment, regardless of any motion to make the complaint more definite and certain. *Stowe v. La Conner Trad. & Transp. Co.*..... 28

9. **DAMAGES—EVIDENCE—OTHER ACCIDENTS—CROSS-EXAMINATION.** In an action for personal injuries where the appellant's counsel asked a witness if there was any similar injury to another person at the same time and place, the appellant cannot complain if the same inquiry was pursued on cross-examination of the witness. *Id.*.. 28
10. **SAME—PAIN AND SUFFERING—INSTRUCTIONS.** In an action for personal injuries, an instruction to the effect that there can be no fixed measure of compensation for pain and suffering nor for loss of time, is not prejudicial when coupled with correct instructions as to the amount to be awarded therefor. *Id.*..... 28
11. **SAME—ERROR CURED BY SUBSEQUENT INSTRUCTIONS.** An instruction authorizing a recovery for such future pain and suffering as the plaintiff may endure as the ordinary and actual result and as a consequence of the injury is not prejudicial error in that it fails to limit the recovery to such future pain and suffering as would reasonably and probably flow from the injury, especially in view of an instruction that under no circumstances should an unreasonable or excessive verdict be returned. *Kirkham v. Whceler-Osgood Co.*.. 415

DANGEROUS PREMISES:

Defective dock, see **DAMAGES**, 10.

DEATH:

Of railroad brakeman, see **MASTER AND SERVANT**, 14, 15, 27.

Joinder of causes of action for death and funeral expenses, see **ACTION**, 2.

1. **DEATH BY WRONGFUL ACT—RIGHT OF ACTION—HEIRS LIMITED TO WIDOW AND CHILDREN—STARE DECISIS.** Upon the principle of *stare decisis*, the word "heirs" in Bal. Code, § 4828, descriptive of the persons who may maintain actions for the wrongful death of another, is restricted to the widow and children of the deceased, and cannot be extended to the widower on the principle that widow and widower can be used interchangeably in the statute. *Johnson v. Seattle Electric Co.*..... 211

DEBTOR AND CREDITOR:

See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**.

DECEDENT:

Estates, see **DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS**.

DECREE:

In divorce, see DIVORCE.

In probate as proof of heirship, see DESCENT AND DISTRIBUTION, 3.

DEDICATION:

Of plat, as notice of hostile claim, see ADVERSE POSSESSION, 2.

DEEDS:

Prior to patent, see VENDOR AND PURCHASER, 1.

Recitals as proof, see DESCENT AND DISTRIBUTION, 2.

Tax deeds, see TAXATION, 1.

Title of grantors, statements, see ESTOPPEL, 7.

1. DEEDS—TAKING TITLE IN ASSUMED NAME—VALIDITY. Where a man purchases, and takes title to, real estate in the assumed name of his son, with his own funds and for his own use, the title vests in him, and the property does not belong to the son. *Chapman v. Tyson*..... 523
2. SAME — CONVEYANCE BY ASSUMED NAME — FORGERY — VALIDITY OF DEED. Where a party purchased, and took title to, real estate in an assumed name, his deeds conveying the same under the same name to parties who dealt with and knew him by such assumed name, are not forgeries and are sufficient to pass title. *Id.*..... 523

DEFAULT:

Of husband, effect as to wife, see HUSBAND AND WIFE, 2.

Vacation, see JUDGMENT, 3-5.

Vacation of, finality, see APPEAL AND ERROR, 3.

DEFECT:

In performance of contracts, see CONTRACTS, 3-6.

Of parties, see PARTIES, 1, 2.

DELIVERY:

Of goods, see CARRIERS, 1, 2.

Time for delivery of materials, see CONTRACTS, 1.

DEMURRAGE:

See INDEMNITY, 3.

DEMURRER:

See MANDAMUS, 2.

In pleading, see PLEADING, 4, 5.

DENIALS:

In pleading, see PLEADING, 1, 6.

DENTISTS:

Prosecution for practicing without a license, see CRIMINAL LAW, 9, 24.

DESCENT AND DISTRIBUTION:

See EXECUTORS AND ADMINISTRATORS.

1. DESCENT AND DISTRIBUTION—HOMESTEAD—DEATH OF WIFE PRIOR TO ISSUANCE OF PATENT—RIGHTS OF CHILDREN. Where a married man makes a homestead entry, and, upon the death of the wife before making final proof, a patent is issued in his name, the children, as heirs of the mother, acquire a one-half interest in the land. *Cox v. Tompkinson*..... 70
2. DESCENT AND DISTRIBUTION—PROOF OF HEIRSHIP—EVIDENCE—RECITALS IN DEED—COMPETENCY. Recitals in a deed, describing the grantors as heirs of a certain party, cannot be used as proof of heirship, in favor of the grantors or their successors. *Mace v. Duffy*..... 597
3. SAME—JUDGMENT—ADMINISTRATION—FOREIGN DECREE OF DISTRIBUTION—EXTRA-TERRITORIAL FORCE. A final decree of distribution of a court of probate in Alaska, awarding estate there to parties found to be legal heirs of the deceased, is not competent evidence of heirship, as against a stranger to the record, with respect to real property in this state. *Id.*..... 597

DESERTION:

Ground for divorce, see DIVORCE, 1.

DIRECTORS:

Of corporations, see CORPORATIONS, 1-3.

Of school district, powers, see SCHOOLS AND SCHOOL DISTRICTS, 1.

DISCHARGE:

From indebtedness, see COMPROMISE AND SETTLEMENT, 1.

Of surety, see INDEMNITY, 2, 3.

DISCRETION OF COURT:

See NEW TRIAL, 4, 6, 9.

Allowing amendments, see PLEADING, 7.

Abuse of, see JUDGMENT, 11.

Of court to award jury trial, see TRIAL, 1, 2.

DISMISSAL AND NONSUIT:

Of appeal, see APPEAL AND ERROR, 1, 2, 9, 15-17.

For failure to amend, see PLEADING, 5.

For want of equity, see CORPORATIONS, 1, 2.

Upon opening statement of counsel, see TRIAL, 7.

DISSEIZIN:

Entry under mistake, see ADVERSE POSSESSION, 1.

DISTRIBUTION:

Of estate of decedent, see DESCENT AND DISTRIBUTION.

DIVORCE:

See **NEW TRIAL**, 2.

Sufficiency of evidence, see **APPEAL AND ERROR**, 21,

1. **DIVORCE—ABANDONMENT—EVIDENCE—SUFFICIENCY.** A clear case of abandonment is shown, where, after the dismissal of an action for divorce brought by the wife on the ground of abandonment, the husband returned to the state of Washington, but not to his home, and refused for four years to live with or make any provision for his family, although requested to do so. *Clemans v. Western*.. 290
2. **DIVORCE—CRUELTY—RENDERING LIFE BURDENSOME—FINDINGS—CONSTRUCTION.** Upon granting a divorce for cruelty, the findings need not specifically include one that the cruelty rendered life burdensome, where the specific acts of cruelty found conclusively show that they did render life burdensome. *Mitchell v. Mitchell*.... 431
3. **SAME—DISTRIBUTION OF PROPERTY—AWARDING ALL TO WIFE—DISCRETION.** It is within the discretion of the trial court, upon granting a divorce and awarding the custody of infant children to a wife, to award her all the real estate, of the value of \$1,600, where she is not strong and the husband is an able bodied man and wholly at fault. *Id.*..... 431
4. **SAME—DECREE—ALTERNATIVE PAYMENT—TAKING ADVANTAGE OF.** Error cannot be predicated on the entry of a judgment of divorce decreeing real estate to the wife, without giving the defendant an opportunity to take advantage of an alternative, expressed in the conclusions of law, of paying \$1,600 in lieu thereof, where the record fails to show that the defendant desired so to do at the time the judgment was entered. *Id.*..... 431
5. **DIVORCE—DIVISION OF PROPERTY—ALL AWARDED TO WIFE.** Upon granting a divorce to a wife on the ground of abandonment, and awarding to her the custody of three minor children, it is just to award her all the property, where it appears that it had been conveyed to her, heavily incumbered eight years before, the equity not exceeding \$2,500, and that the wife, unassisted, after eight years of hardship, had saved it from foreclosure and paid off more than \$3,000 of the indebtedness against it. *Clemans v. Western*..... 290
6. **DIVORCE—CUSTODY OF CHILDREN—REVIEW—EVIDENCE—SUFFICIENCY.** In an action for a divorce and the custody of children 10 and 11 years of age, where the court grants the husband a divorce upon his cross-complaint, but awards to the wife the custody of the children, together with \$30 per month for their support, the findings will not be reversed on appeal where the court appears to have decided with the weight of the evidence and for the best interests of the children. *Fickett v. Fickett*..... 38

DOGS:

See **ANIMALS**, 1, 2.

Damages for bite, see **DAMAGES**, 5.

DOMICILE:

1. **DOMICILE—AT HOTEL—RESIDENCE OF FAMILY IN ANOTHER STATE.**
A man may establish his domicile by actual residence at a hotel, coupled with an intention to remain, irrespective of the residence of his family, left in another state for the purpose of educating his children. *McCord v. Rosene*..... 1

DUE PROCESS OF LAW:

See **EMINENT DOMAIN**, 4; **INSANE PERSONS**, 1.

DUPLICITY:

Information, see **CRIMINAL LAW**, 4.

EJECTMENT:

Instructions as to entry, see **ADVERSE POSSESSION**, 1.

To recover right of way, see **RAILROADS**, 1, 2.

1. **EJECTMENT—DEFENSES—PRIMA FACIE CASE—SUFFICIENCY—NON-SUIT—JUDICIAL NOTICE OF FACTS NOT IN EVIDENCE.** In ejectment, where the plaintiff makes out a *prima facie* case by a complete chain of title, the defendants' claim of title through earlier conveyances, adverse possession, or a judgment of a court of competent jurisdiction in another case, must be pleaded and proved, and it is error to grant a nonsuit by improperly taking judicial notice of such facts not put in evidence. *Wood v. Earls*..... 21

ELECTION OF REMEDIES:

As to prosecution, see **CRIMINAL LAW**, 8.

ELECTIONS:

School election, see **SCHOOLS AND SCHOOL DISTRICTS**, 2-4.

1. **ELECTIONS—CONTEST—TIME FOR TAKING—DECLARING RESULT.** The time for instituting an election contest, under Bal. Code, §§ 1410, 1430, does not commence to run until the county auditor has certified to the election returns and issued a notice of election. *Cusker v. Berryman*..... 252

ELECTRICITY:

Use of water for generating not public use, see **EMINENT DOMAIN**, 3.

EMINENT DOMAIN:

Condemnation of settler's rights, see **PUBLIC LANDS**, 4.

1. **EMINENT DOMAIN—DAMAGING OF PROPERTY—RAILROADS—CONSTRUCTION—OPERATION—NOISES, FUMES, SMOKE—INCIDENTAL DAMAGES—DAMAGE ABSQUE INJURIA.** The word "damaged" as used in Const. art. 1, § 16, providing that private property shall not be damaged or taken without just compensation having been first made, was not intended to give a right of action where the injuries to property would otherwise have been *damnum absque injuria*, in an action against a natural person or private corporation; hence damage can

EMINENT DOMAIN—CONTINUED.

be recovered for the operation of a railroad on its own nearby property only for such injurious physical effects as the jarring of the earth on the plaintiff's lots, casting soot and cinders thereon, or the emission of smoke physically affecting the property, and not for the usual noises and the emission of fumes, smoke or odors necessarily incident to the operation of trains, not resulting from negligence; these being regarded as *damnum absque injuria*. *Smith v. St. Paul etc R. Co.*..... 355

2. **SAME—ACCESSIBILITY OF CROSS-STREETS.** Excavations by a railroad company, through cross-streets in the neighborhood, affecting the accessibility of the streets, do not constitute an injury to plaintiff's property for which he is entitled to damages, where his property does not abut upon the street, although he may use said streets more than any one else, since his injury differs from that of the public only in degree and not in character. *Id.*..... 355

3. **EMINENT DOMAIN—PUBLIC USE—PUBLIC SERVICE CORPORATIONS—NO CONDEMNATION BY ELECTRIC LIGHT AND POWER COMPANY ORGANIZED FOR COMMERCIAL PURPOSES—PUBLIC NECESSITY AND CONTROL.** The right of eminent domain cannot be exercised in favor of an electric light and power corporation organized for the purpose of diverting water for power purposes for the generation of electricity to be sold commercially to manufactories, railways, and cities, in the absence of statutory regulation and guarantees of the public use and enjoyment of the property; since the same is not a public service corporation, and the use not a public use, and public necessity does not require it. *State ex rel. Tacoma I. Co. v. White River P. Co.*.... 648

4. **SAME—CONSTITUTIONAL AUTHORITY FOR USING WATERS FOR MANUFACTURING PURPOSES.** Const., art. 21, declaring the use of waters for manufacturing purposes a public use, is in conflict with the due process clause of the Federal Constitution in so far as it may be construed to extend the right of eminent domain to take private property for uses essentially private. *Id.*..... 648

EMPLOYEES:

See **MASTER AND SERVANT.**

Municipal, removal, see **OFFICERS, 1-3.**

ENTRY:

Of judgment on bond on dismissal of appeal, see **APPEAL AND ERROR, 1.**

Under mistake, see **ADVERSE POSSESSION, 1.**

EQUITY:

See **INJUNCTION; NUISANCE, 1.**

Equitable estoppel, see **ESTOPPEL.**

Plaintiff not party in interest, see **CORPORATIONS, 1, 2.**

Review in equitable actions, see **APPEAL AND ERROR, 24.**

ESTABLISHMENT:

- Of disputed boundary, see **BOUNDARIES**, 1.
- Of heirship, see **DESCENT AND DISTRIBUTION**, 2, 3.
- Of highways, see **HIGHWAYS**, 1.

ESTATES:

- Decedents' estates, see **DESCENT AND DISTRIBUTION**; **EXECUTORS AND ADMINISTRATORS**.
- Fees, see **TAXATION**, 3.
- Of cotenants, see **TENANCY IN COMMON**.

ESTOPPEL:

- Delay in bringing suit, see **RAILROADS**, 2.
 - In pais, as against minor, see **MASTER AND SERVANT**, 20.
 - By judgment, see **JUDGMENT**, 1-3.
 - To deny agent's authority, see **PRINCIPAL AND AGENT**, 1.
 - To dispute sale by accepting benefits, see **CORPORATIONS**, 3.
 - To question sufficiency of tender, see **VENDOR AND PURCHASER**, 4, 5.
 - To take advantage of mistake in bond, see **INDEMNITY**, 6.
 - Of tenant in common to assert title, see **ADVERSE POSSESSION**, 2.
1. **ESTOPPEL—LACHES—DELAY IN BRINGING SUIT—INCREASE OF VALUES.** Mere delay, short of the statute of limitations, will not bar an action in equity to recover an interest in a mining claim that meanwhile had greatly increased in value, when the fact of plaintiff's claims was at all times known, and there was no deceit or bad faith, and the increase in value was not due to development at the cost and risk of the defendant, but plaintiff was engaged in the development and was in a position to lose as much as the defendant in case of failure. *Eno v. Sanders*..... 238
 2. **ESTOPPEL—INDEMNITY—BONDS—INDEMNITY AGAINST PERSONAL INJURIES FROM NEGLIGENCE—RECOVERY ON MARITIME CONTRACT—SURETY'S DEFENSE OF SUIT—DISMISSAL OF APPEAL WITH PROMISE TO PAY JUDGMENT.** An indemnity company which, in defending an action for a loss, requests the dismissal of the appeal and promises to pay the judgment, is estopped to assert that it did not know the true nature of the claim and is not liable for the amount of the judgment, where it appears that, pursuant to its bond, it undertook the defense through attorneys selected by it, upon representations of the defendant, made in good faith, that the action was to recover for negligence in the operation of a ship, covered by the bond, although a right of action upon a maritime contract not covered by the bond was included, upon which judgment was entered, the claim for negligence being defeated. *Globe Nav. Co. v. Maryland Casualty Co.*..... 299
 3. **ESTOPPEL—INTENT.** A design to mislead is not necessary to create an estoppel, where the conduct is such as to induce a reasonable man to act upon it, and the defendant was warranted in assuming that the unconditional order to dismiss the appeal was advisedly made. *Id.*..... 299

ESTOPPEL—CONTINUED.

4. **SAME—EQUITY.** It cannot be urged to defeat the estoppel that the parties stood upon an equal footing, since the duty of making the defense devolved upon the indemnity company. *Id.*..... 299
5. **SAME—KNOWLEDGE OF FACTS—NEGLIGENCE.** In such a case, the estoppel is not defeated by reason of the fact that the company did not have full knowledge of the facts respecting the judgment, which was entered in Hawaii, where it had a copy of the libel and was in communication by means of which the fact could have been ascertained; since it was reasonably under obligations to ascertain the facts, and was more than ordinarily negligent in ordering the dismissal without doing so; and since it is bound by the knowledge of the attorneys, who only nominally represented the defendant. *Id.* 299
6. **SAME—PREJUDICE TO EFFECT ESTOPPEL.** An abandonment of the right of appeal is presumed to be prejudicial, hence the estoppel was not without prejudice from the fact that the judgment was without error and would have been affirmed; since that fact cannot be demonstrated, and evidence to prove it is inadmissible. *Id.*..... 299
7. **ESTOPPEL—STATEMENTS WITHDRAWN—RELIANCE UPON.** An estoppel to dispute the heirship of certain grantors in a deed cannot be claimed by the grantees, where the statements relied upon as an estoppel were expressly withdrawn before the grantees purchased the property. *Mace v. Duffy*..... 597

EVIDENCE:

See WITNESSES.

Admission, see PLEADING, 2, 3.

Newly discovered, as ground for new trial in civil actions, see NEW TRIAL, 4-10.

Pleading and proof, variance etc., see PLEADING, 9.

Reception at trial, objections, see TRIAL, 3, 32.

Review on appeal, see APPEAL AND ERROR, 6, 19-27, 32-34, 37, 41, 42.

As to particular facts or issues: See COMPROMISE AND SETTLEMENT, 1; DAMAGES, 1-3, 8-11; DOMICILE; FIXTURES. Of authority of officers, see CORPORATIONS, 6, 7. Boundary by adverse possession, see BOUNDARIES, 1. Declaration of agent to prove authority, see CONTRACTS, 4. Desertion, see DIVORCE, 1. Of estoppel, see ESTOPPEL. Grub-stake, see CONTRACTS, 8-10. Proof of heirship, see DESCENT AND DISTRIBUTION, 2, 3. Knowledge of vicious propensity, see ANIMALS, 1. License to maintain fish traps, see WATERS, 4. Of loss of goods at sea, see CARRIERS, 5. Of negligence in collision of vessels, see COLLISION, 1. Ownership of vessel, see SHIPPING, 1. Oral agreement varying note, see BILLS AND NOTES, 1. To prove oral contract, see CONTRACTS, 7. Of pain, see DAMAGES, 2. Parol to vary writing, see SALES, 3. Of part performance, see FRAUDS, STATUTE OF, 1, 2. To establish sale, see APPEAL AND ERROR, 25. Value of goods, see EXEMPTIONS, 2.

EVIDENCE—CONTINUED.

In actions by or against particular classes of parties: See CARRIERS, 1-5; CORPORATIONS, 1-7; FACTORS. Agency, see PRINCIPAL AND AGENT, 1-3.

In particular civil actions or proceedings: Abandonment, see DIVORCE, 6. Abandonment of possession, see ADVERSE POSSESSION, 5. Of adverse use, sufficiency, see ADVERSE POSSESSION, 2. Of abode of decedent, see EXECUTORS AND ADMINISTRATORS, 2. Upon appeal from municipal assessment, see MUNICIPAL CORPORATIONS, 1. For breach of contract, see CONTRACTS, 2, 4, 5. Condemnation proceedings, see EMINENT DOMAIN, 1. 2. Contempt proceedings, see CONTEMPT, 1-3. To support findings in divorce, see APPEAL AND ERROR, 21. To support findings in equity, see APPEAL AND ERROR, 24. Foreclosure, see MECHANICS' LIENS, 2. On note, see BILLS AND NOTES, 1. For personal injuries to passengers, see CARRIERS, 8-9. To support findings for personal injuries, see APPEAL AND ERROR, 23. For personal injuries, see MASTER AND SERVANT, 3, 5, 10, 17, 18, 19, 28. For personal injuries, through defects in streets, see MUNICIPAL CORPORATIONS, 6, 8, 9. In probate proceedings, see EXECUTORS AND ADMINISTRATORS, 7, 10. For appointment of receiver, see CHATTEL MORTGAGES, 1. For rescission of contract to sell land, see VENDOR AND PURCHASER, 6.

In criminal prosecutions: Admissions, see CRIMINAL LAW, 13-15. Adultery, see CRIMINAL LAW, 19, 20. Of arson, see CRIMINAL LAW, 10. Contradicting recitals of arraignment, see CRIMINAL LAW, 23. Cross-examination, see CRIMINAL LAW, 12. Harmless error, see CRIMINAL LAW, 32. Of homicide, see CRIMINAL LAW, 17. Of insurance policy, see CRIMINAL LAW, 11. Manslaughter, see CRIMINAL LAW, 18. Of marriage, see CRIMINAL LAW, 20, 22. Practicing dentistry without license, see CRIMINAL LAW, 24. Of rape, see CRIMINAL LAW, 8. Insufficiency, instructions, see CRIMINAL LAW, 30, 31.

1. EVIDENCE—LETTERS—COMPETENCY—FAILURE TO ANSWER—ADMISSIONS—WITNESSES—IMPEACHMENT. The failure to answer letters or deny the statements therein, does not amount to an admission of the statements, so as to make the letters admissible to impeach testimony to the effect that that the party never admitted the statements; and the letters are properly excluded, even if competent as independent evidence, when offered only for the purpose of impeachment, where they contain nothing contrary to the evidence of the witness to be impeached. *Irwin v. Buffalo Pitts Co.*..... 346
2. EVIDENCE—LETTERS OF PARTY—FAILURE TO REPLY—ATTORNEYS—AUTHORITY. The failure of an attorney for collection to reply to letters asserting the debtor's version of a contract, does not admit their contents, or render them admissible in evidence as implied admissions of his client. *Id.*..... 346

EXAMINATION:

Of jurors, see **JURY**, 1.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 5, 6, 27.

EXCESSIVE DAMAGES:

See **DAMAGES**, 4-7.

EXECUTION:

Exemptions, see **EXEMPTIONS**.

EXECUTORS AND ADMINISTRATORS:

See **DESCENT AND DISTRIBUTION**.

Allowance to widow, see **MANDAMUS**, 3.

Loan to pay debts of estate, see **SUBROGATION**, 1, 2.

Probate fees and inheritance tax, see **TAXATION**, 3.

1. **EXECUTORS AND ADMINISTRATORS—JURISDICTION—ADMINISTRATION IN DIFFERENT COUNTIES—ABODE OF DECEDENT AT TIME OF DEATH.** Upon the death of a resident of this state, exclusive jurisdiction to issue general letters of administration rests in the superior court of the county of the decedent's residence or place of abode at the time of his death, regardless of a prior appointment of a special administrator in the county in which he died. *Stern v. Still*..... 557
2. **EXECUTORS AND ADMINISTRATORS—APPOINTMENT—APPLICATIONS IN DIFFERENT COUNTIES—JURISDICTION—ABODE OF DECEDENT.** Upon an application for the appointment of a general administrator, it sufficiently appears that the place of abode of the decedent, at the time of his death, was in the county of S, when several witnesses testified that they had known him as a resident of such county for from 26 to 40 years, and that he owned farms and other property in that county, although he died while in a hospital in the county of K, and one witness testified that he said he resided in that county. *Id.*.. 557
3. **SAME—APPOINTMENT—RIGHTS OF NEXT OF KIN—WHO MAY RAISE OBJECTIONS.** One who is not next of kin cannot object to the appointment of a general administrator on the ground that the time has not expired during which the next of kin have a preference right to apply for letters upon the estate. *Id.*..... 557
4. **SAME—APPLICATION—SUFFICIENCY.** An application for letters of administration need not set forth the non-pendency of other applications. *Id.*..... 557
5. **SAME—DEFECTS—AMENDMENTS.** A defective application for letters of administration will be deemed amended to conform to the proof in the absence of a showing of prejudice. *Id.*..... 557

EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. EXECUTORS AND ADMINISTRATORS—REMOVAL—CITATION AND HEARING—WITHDRAWAL OF RESIGNATION—EFFECT ON HEARING. Where an administrator tendered his resignation with his final account, and the heirs joined issue thereon, asking the revocation of his letters for neglect of duty, he cannot evade the issue by withdrawing his resignation, and no notice or citation to him is required, upon fixing a day for the hearing. *In re Dietrich's Estate*..... 520
7. SAME—NEGLECT OF DUTY—GROUNDS FOR REMOVAL—SUFFICIENCY. The removal of an administrator is justified where it appears that, after four months, he had filed no inventory of the estate or caused the same to be appraised, that he had given no notice to creditors, had failed to take vouchers for money paid out, and had temporarily removed from the state. *Id.*..... 520
8. EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—PENDENCY OF LITIGATION—JURISDICTION. An objection to the jurisdiction of the court to settle the final account of executors, because of the pendency of appeals in the supreme court in litigation concerning the distribution of the property, is unavailing, where at the time of the hearing in the supreme court such appeals have been finally determined. *Drasdo v. Jobst*..... 425
9. SAME—FINDINGS—RECITALS—SEPARATE CHARACTER OF PROPERTY—FORMER ADJUDICATION IN COURSE OF ADMINISTRATION—FINALITY. Upon the final distribution of an estate, error cannot be predicated on recitals in the findings as to the separate and community character of the property, and the findings cannot be reviewed, where that matter had formerly been determined in the course of administration in special proceedings for the purpose, and the findings made no change in that respect. *Id.*..... 425
10. SAME—DEBTS—FINDINGS. A finding upon the final settlement of the estate that there are no debts, is sustained where the evidence showed no debts except funeral expenses and the costs of administration, and the only bill presented was disallowed. *Id.*..... 425

EXEMPTIONS:

1. EXEMPTIONS—CLAIM BY DEBTOR—LIST OF PROPERTY—SUFFICIENCY. Where goods levied upon are claimed as exempt by the debtor, under Bal. Code, § 5255, a second list by separate items of the property claimed as exempt is not necessary, where the sworn statement delivered to the officer contained a list of all the debtor's property and claimed all of it as exempt. *Wiser v. Thomas*..... 40
2. SAME—VALUE OF PROPERTY—COMPLAINT—PLEADING AND PROOF. Where property levied upon was claimed as exempt by the debtor, who admitted at the trial that part of it was not exempt because the judgment was for unpaid purchase money thereon, the fact that the debtor's sworn statement, and also his complaint, alleged the value

EXEMPTIONS—CONTINUED.

of all the property to be \$250, does not confine his proof of the total value to such sum, or limit his recovery to the difference between such sum and the value of the non-exempt property; but he is entitled to show that exempt property of the value of \$250 was levied upon and taken. *Id.*..... 40

FACTORS:

1. **FACTORS—PRINCIPAL AND AGENT—AGENT SELLING ON COMMISSION—NOTE FOR ADVANCES—DEFENSES—NEGLIGENCE IN CARE OF GOODS—FAILURE TO SELL AS INSTRUCTED—RATIFICATION—SETTLEMENT WITHOUT DISAPPROVING ACTS—WAIVER OF CLAIM.** In an action upon a promissory note, given for the amount of advances made by the plaintiff, a factor, to whom wool had been consigned by the defendant for sale on commissions, the defendant cannot set up as a defense and counterclaim the negligence of the factor in caring for the wool and the failure to sell according to instructions, where it appears that the wool had been shipped and the advances made more than a year prior to the execution of the note, and any neglect of the plaintiff was prior to that time, that the defendant then called on the plaintiff, examined the wool, made no complaint and gave orders that it be further held, and gave his note on the plaintiff's statement of the amount then due, and then waited a year longer before making any claim; since he ratified the acts of the factor by failing to disapprove of the same within a reasonable time; and in the absence of evidence of failure of duty after the execution of the note, a verdict should have been directed for the plaintiff. *Allen v. McAllister*..... 440

FACTORY ACT:

See **MASTER AND SERVANT**, 1, 2, 13, 20.

FALSE REPRESENTATIONS:

See **SALES**, 1.

Of minor as to age, see **MASTER AND SERVANT**, 20.

Sale of corporate stock, see **CORPORATIONS**, 5.

As ground for rescission of land contract, see **VENDOR AND PURCHASER**, 6.

FEES:

As costs, see **COSTS**, 1.

Upon estates in probate, see **STATUTES**, 1.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 5-7, 15, 17.

FINDINGS:

See **CARRIERS**, 5; **DIVORCE**, 2, 6.

In probate proceedings, see **EXECUTORS AND ADMINISTRATORS**, 9, 10.

Res judicata, see **JUDGMENT**, 1.

Review on appeal, see **APPEAL AND ERROR**, 6, 21-27, 36.

FISH:

Destruction of fish traps, see **WATERS**, 4, 5.

FIXTURES:

1. **FIXTURES—WHAT ARE—FURNACE, BOILER AND PIPES.** A furnace and boiler in a theater building, resting upon solid foundations, and which could not be removed without tearing away masonry, together with the pipes and radiators connected therewith, are fixtures and pass upon a sale of the realty. *Filley v. Christopher*..... 22
2. **SAME—OPERA CHAIRS, CURTAINS AND APPLIANCES IN THEATER.** Opera chairs in a theater screwed to the floor, drop curtains, scenery, and the usual appliances, are fixtures and part of the realty within the criterion: (1) actual annexation to the realty or appurtenant thereto; (2) application to the purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party. *Id.*..... 22
3. **SAME—EVIDENCE OF INTENTION OF PARTY.** The surrender of a ticket box with the sale of a theater building, by the person who placed it therein, may be considered as indicative of his intention, upon the question of its annexation to the realty as a fixture. *Id.*..... 22
4. **SAME—REMOVAL—INJURY TO BUILDING AND VALUE OF ARTICLE.** Instructions to the jury on the subject of what constitutes a fixture should not give too much prominence to the injury to the building from removal and the value of the article removed, which are circumstances to be considered, but not controlling. *Id.*..... 22

FORECLOSURE:

Of lien, see **MECHANICS' LIENS**, 1, 2.
Mechanics' liens on leasehold, see **TENANCY IN COMMON**, 1.
Of mortgage, see **CHATTEL MORTGAGES**, 1.
Of tax lien, see **TAXATION**, 1, 2.

FORFEITURES:

Of contract to purchase land, see **VENDOR AND PURCHASER**, 4, 5.

FORGERY:

Deed in assumed name, see **DEEDS**, 2.

FORMER ADJUDICATION:

See **JUDGMENT**, 1, 2.

FRAUD:

See **CONTRACTS**, 2; **DEEDS**, 1, 2; **HUSBAND AND WIFE**, 1; **SALES**, 1.
Action for, service by publication, see **JUDGMENT**, 4.
Corporate officers, sale of corporate stock, see **CORPORATIONS**, 1-3, 5.
Sales of realty, see **VENDOR AND PURCHASER**, 6.
Vacation of judgment against infant for, see **INFANTS**, 2.

FRAUDS, STATUTE OF:

Interest in real estate, grub-stake agreement, see **CONTRACTS**, 9.

1. **FRAUDS—STATUTE OF—ORAL AGREEMENT TO CONVEY LAND—PART PERFORMANCE—JOINT OWNER HOLDING TITLE IN TRUST.** There is such part performance of a verbal contract to convey land as to take the same out of the operation of the statute of frauds, where it appears that it was purchased by the parties jointly, and title taken in the name of the plaintiff in trust, who verbally agreed to deed to the defendant upon payment of the full consideration, that defendant went at once into the possession of the land, and had fully paid the consideration, and performed his part of the contract. *Jomslund v. Wallace*..... 487
2. **FRAUDS, STATUTE OF—SALES—PART PAYMENT.** A payment and part performance, sufficient to take an oral sale of 100 tons of hay and oats out of the operation of the statute of frauds, is shown, where two witnesses testify positively that, when the contract was made orally with the president of the vendor on its behalf, over \$1,700 in gold dust was delivered to him at Dawson, about \$700 of which was in part payment for the goods, and in response to a telegraphic order, the vendor shipped five tons thereof to Dawson. *Lilly v. Lilly, Bogardus & Co.*..... 323

FRAUDULENT CONVEYANCES:

Of community property by husband, see **HUSBAND AND WIFE**, 1.
Selling all assets, see **CORPORATIONS**, 1-3.

FREEHOLD:

Freeholder, competency as juror, see **JURY**, 1.

FUNERAL EXPENSES:

Joinder with cause of action for death, see **ACTION**, 2.

GARNISHMENT:

Of assignee for creditors, see **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 1.

GOOD FAITH:

Stockholder's suit against corporation, see **CORPORATIONS**, 1-3.

GRAND JURY:

Authority to employ stenographer, see **COUNTIES**, 1.

GRANT:

Right of way across public lands, see **PUBLIC LANDS**, 4.

GRUB-STAKE:

See **CONTRACTS**, 8-10.

GUARANTY:

See INDEMNITY.

GUARDIAN AND WARD:

Action by minor, see PARTIES, 1.

Guardian ad litem, authority to mortgage infant's land, see INFANTS, 1.

Loan to pay debts of estate, see SUBROGATION, 1, 2.

HARMLESS ERROR:

See APPEAL AND ERROR, 29-38.

In criminal prosecution, see CRIMINAL LAW, 20, 21, 32.

HEALTH:

Confining dangerous insane persons, see CONSTITUTIONAL LAW, 1.

HEIRS:

See DESCENT AND DISTRIBUTION.

Proof of heirship, statements, see ESTOPPEL, 7.

Recovery for wrongful death, see DEATH, 1.

HIGHWAYS:

1. HIGHWAYS—PUBLIC LAND—SCHOOL SECTION—GRANT BY CONGRESS—RESERVATION FOR PUBLIC USE—CONSTRUCTION. The right of way over public lands except those reserved for public use, granted by U. S. Rev. Stats., § 2477, for the construction of public highways, applies to school sections 16 and 36; since U. S. Rev. Stats., § 1947, reserving such sections for the use of the common schools was but a declaration of governmental policy and did not reserve them for public use so as to except them from the operation of the grant; hence the maintenance of a public road over a school section for more than seven years establishes a valid subsisting public highway under Bal. Code, § 3846. *Peterson v. Baker*..... 275

HIRING:

Of minors, see MASTER AND SERVANT, 1.

HOMESTEAD:

Death of wife before patent, heirs, see DESCENT AND DISTRIBUTION, 1.

Deed prior to patent, effect, see VENDOR AND PURCHASER, 1.

HOMICIDE:

See CRIMINAL LAW, 17, 18, 30, 31; INSANE PERSONS, 1.

HOTELS:

Residence at, see DOMICILE, 1.

HOUSEHOLDER:

See JURY, 1.

HUSBAND AND WIFE:

See DIVORCE.

Action for funeral expenses of wife, joinder, see ACTION, 2.

Admissions of wife, see CRIMINAL LAW, 13-16.

As witnesses against each other after divorce, see WITNESSES, 2.

Recovery by husband for death of wife, see DEATH, 1.

Recovery for services of wife as nurse, see DAMAGES, 8.

Rights of survivor, see DESCENT AND DISTRIBUTION, 1.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—HUSBAND'S CONVEYANCE IN FRAUD OF CREDITORS—WIFE NOT BOUND BY. A release by a husband of interests in community property, made in fraud of creditors, cannot be held valid as between the parties where it was not made known to the wife. *Zetmantz v. Blake*..... 6
2. HUSBAND AND WIFE—ACTIONS AGAINST—COMMUNITY PROPERTY—REPLEVIN—DEFAULT OF HUSBAND—EFFECT ON DEFENSE BY WIFE. In replevin brought against a husband and wife, who defend jointly, claiming the property as community personalty, a default judgment against the husband for failure to answer interrogatories, is not binding on the wife, since under Bal. Code, § 4827, she is entitled to defend in her own right upon the issues raised by her answer; and a judgment of dismissal on plaintiff's failure to prove title, is proper. *Glass v. Buttner*..... 296

IMPEACHMENT:

Of witnesses, see WITNESSES, 4.

IMPLIED CONTRACTS:

See CONTRIBUTION, 1.

IMPRISONMENT:

See INSANE PERSONS, 1.

IMPROVEMENTS:

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 1-4.

As notice of adverse claim, see ADVERSE POSSESSION, 2, 5.

Boundary by adverse possession, see BOUNDARIES, 1.

INDEMNITY:

Action to recover on bond, see ESTOPPEL, 2-6.

Personal injury, prejudicial statements of counsel, see TRIAL, 5.

1. INDEMNITY—GUARANTEEING BUILDING CONTRACT—PLEADING—COMPLAINT—SUFFICIENCY—PERFORMANCE OF CONDITIONS PRECEDENT—LEGAL EFFECT OF CONTRACT. In an action upon an indemnity bond guaranteeing the performance of a building contract, a complaint is not subject to objection, made for the first time at the trial, for failure to plead compliance with conditions precedent, where the bond and contract are not set out but are pleaded according to their legal effect and no conditions precedent appear. *Leghorn v. Nydell*... 17

INDEMNITY—CONTINUED.

2. SAME—DISCHARGE OF SURETY—PAYMENT OF INSTALLMENT PRIOR TO ITS MATURITY. In an action upon an indemnity bond guaranteeing a building contract, the surety cannot complain of a payment made by the owner to the contractor prior to its falling due, when the same was deducted from the last payment due and benefited rather than prejudiced the surety. *Id.*..... 17
3. INDEMNITY—RELEASE OF SURETY—DELAY OF CONTRACTOR—FAILURE OF OWNER TO TAKE CHARGE OF BUILDING. The owner of premises is under no obligation to take charge of and complete a building to lessen the demurrage charges on the contractor's default by delay, when the contractor was endeavoring in good faith to complete the building, and failure so to do does not release a surety on an indemnity bond. *Id.*..... 17
4. INDEMNITY—ACTION ON BOND—NOTICE OF DEFECT AND LIMITATION OF ACTION. In an action upon an indemnity bond guaranteeing a building contract, it is necessary for the plaintiff, if it has knowledge of the defect, to give notice and bring suit within the time limited in the bond. *Novelty Mill Co. v. Heinzerling*..... 244
5. INDEMNITY—COST OF DEFENDING SUIT—LIABILITY UPON ONE OF SEVERAL CAUSES. Where an indemnity company was required by its bond to defend actions for negligence at its own expense, and made defense to an action for negligence, in which was joined, also, a right of action upon a maritime contract for medical attendance, it is liable for all the costs and expense incurred, where the record fails to show what amount was expended to establish the defense to the cause of action upon the maritime contract. *Globe Nav. Co. v. Maryland Casualty Co.*..... 299
6. INDEMNITY—BONDS—OF CONTRACTOR ON PUBLIC WORK—DEFENSES—RUNNING TO CITY—MISTAKE OF OBLIGORS. The principal and sureties upon a contractor's statutory bond given to a city to protect laborers and materialmen upon a public work, cannot take advantage of a mistake whereby the bond runs to the city, instead of to the state as required by statute. *Huggins v. Sutherland*..... 552
7. SAME—ACTION BY MATERIALMEN—FILING CLAIMS WITH CITY—RELEASE OF SURETIES. Materialmen who furnished material to a contractor upon municipal work cannot maintain an action against the sureties upon the contractor's statutory bond, unless, within thirty days after the completion of the contract, they filed their claims with the city council, as required by Laws 1899, p. 172; such notice being for the benefit of the sureties, and failure to give the same operating to discharge them. *Id.*..... 552

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 10, 30-36.

INDICTMENT AND INFORMATION:

See CRIMINAL LAW, 1-8, 23, 25.

INFANTS:

Actions by, see PARTIES, 1.

Child labor, see MASTER AND SERVANT, 1, 20-23.

Custody and support on divorce of parents, see DIVORCE, 3, 5, 6.

1. INFANTS—MORTGAGE OF LANDS. The authority to sell an infant's real estate does not give authority to mortgage it. *Wilson v. Hubbard*..... 671
2. INFANTS — JUDGMENTS — VACATION — LIMITATIONS. A judgment entered against infants upon proper service is not void, but voidable only, and cannot be attacked for fraud or error of law, under Bal. Code, § 5153, unless the proceeding is commenced within one year after the infants attain majority. *Id.*..... 671

INHERITANCE:

See DESCENT AND DISTRIBUTION.

INJUNCTION:

See NUISANCE, 1; PROHIBITION, 2.

To restrain issuance of school warrants, see SCHOOLS AND SCHOOL DISTRICTS, 4.

Restraining logger from obstructing stream, see WATERS, 1, 2.

Restraining sale of corporate assets, see CORPORATIONS, 3.

Superseding on appeal, see APPEAL AND ERROR, 10.

1. INJUNCTION — BOYCOTT — MAINTAINING PICKETS — ACTION TO RESTRAIN — PLEADING — COMPLAINT — SUFFICIENCY. A complaint in an action to enjoin the picketing or boycott of a nonunion place of business states a cause of action, where it alleges that, upon failing to discharge a nonunion employee, the defendants, composing a union, ordered and maintained a strike against the plaintiff, and in pursuance thereof congregated about his place of business in great numbers, and maintained pickets informing his patrons that it was a scab and unfair place and attempting to dissuade persons from entering therein, etc., thereby affecting his trade; since such acts amount to an invasion of the plaintiff's lawful rights, and are properly restrained by injunction. *Jensen v. Cooks' & Waiters' Union*.. 531

INSANE PERSONS:

Confinement, see CONSTITUTIONAL LAW, 1.

Insanity as defense to crime, see CRIMINAL LAW, 17, 18.

1. INSANE PERSONS—ACQUITTAL OF CRIME ON GROUND OF INSANITY—IMPRISONMENT—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRESUMPTIONS. One accused of murder, who submits a plea of insanity to trial by jury and is found not guilty by reason of insanity, may be confined in the county jail until the further order of the court, conformably to Bal. Code, § 6959, and is not deprived of his liberty without due process of law where he does not allege a restoration

INSANE PERSONS—CONTINUED.

- of sanity; since he was duly accorded a fair trial, and the presumption of insanity, once found, continues; and since the law does not prevent a judicial investigation as to restored sanity. *In re Brown*..... 160
2. **SAME—JUDGMENT—CERTAINTY.** An order for the confinement of a dangerous insane person until the further order of the court is not void for uncertainty, the order being subject to modification upon application. *Id.*..... 160

INSOLVENCY:

- See **ASSIGNMENTS FOR BENEFIT OF CREDITORS; CORPORATIONS, 1-3.**
- Of mortgagor, receiver for, see **CHATTEL MORTGAGES, 1.**

INSPECTION:

- By vendee, see **SALES, 1; VENDOR AND PURCHASER, 6.**

INSTRUCTIONS:

- In civil actions, see **CARRIERS, 6, 7, 10; CONTRACTS, 6; DAMAGES, 3, 10, 11; FIXTURES, 4; MALICIOUS PROSECUTION, 1; MASTER AND SERVANT, 21-26; MUNICIPAL CORPORATIONS, 5, 6; TRIAL, 9.**
- In criminal prosecutions, see **CRIMINAL LAW, 8, 29-31.**
- Harmless error in, see **APPEAL AND ERROR, 28-31.**

INSURANCE:

- Employer's liability, see **INDEMNITY, 5.**

INTENT:

- Intention, see **DEEDS, 1, 2; DOMICILE, 1.**
- To annex fixtures, see **FIXTURES, 2, 3.**
- Design to mislead, see **ESTOPPEL, 3.**

INTERROGATORIES:

- Interrogatories, see **SHIPPING, 1.**
- Default of husband, see **HUSBAND AND WIFE, 2.**

INTOXICATING LIQUORS:

- Incompetency of servant from use of, see **MASTER AND SERVANT, 5.**

INVENTORY:

- Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS, 7, 9.**

JETTISON:

- Of goods at sea, see **CARRIERS, 5.**

JOINDER:

- Of causes of action, see **ACTION, 1, 2; PLEADING, 5.**
- On appeal from new assessment, see **MUNICIPAL CORPORATIONS, 4.**
- Of parties in civil actions, see **PARTIES, 1, 2.**
- Of parties in criminal prosecutions, see **CRIMINAL LAW, 5.**

JOINT TENANCY:

See TENANCY IN COMMON.

Possession by joint tenant, see FRAUDS, STATUTE OF, 1.

JUDGES:

Comment on facts, see APPEAL AND ERROR, 37; CRIMINAL LAW, 27, 28, 30.

JUDGMENT:

See HUSBAND AND WIFE, 2.

Against infants, vacating, see INFANTS, 5.

Against principal and surety, see ACTION, 1.

In the alternative respecting property, see DIVORCE, 4.

Conclusiveness, see MANDAMUS, 3.

Of confinement, see INSANE PERSONS, 2.

For contempt, recitation of facts, validity, see CONTEMPT, 3.

Decisions of courts in general, see COURTS, 1.

In lower court against sureties after dismissal of appeal, see APPEAL AND ERROR, 49, 50.

Nonsuit, see EJECTMENT, 1.

On pleadings, see ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

Presumption in aid of, see JURY 1.

Res judicata, see EXECUTORS AND ADMINISTRATORS, 9.

Review, see APPEAL AND ERROR.

1. JUDGMENT—FINDINGS—RES JUDICATA. Findings of fact and conclusions of law in a suit in which no final judgment was entered are not res judicata of the issues determined. *Wilson v. Hubbard*..... 671
2. JUDGMENT—RES ADJUDICATA—ACTION OF CONTRACT—SAME ISSUE RAISED BY SUPPLEMENTAL COMPLAINT IN FORMER ACTION OF REPLEVIN—BAR. Where, in a supplemental complaint in replevin, the plaintiff claimed damages for the expense of shipping and repairing the logging engine replevied, a judgment in favor of the defendant, upon finding that the plaintiff had sustained no damages by reason of the detention and withholding of the property, is *res adjudicata* upon a subsequent suit between the same parties to recover damages for the expense of said shipment and repairs. *Vulcan Iron Works v. Kent Lumber Co.*..... 435
3. JUDGMENT—VACATION—GOOD CAUSE—SHOWING. Good cause for the vacation of a default judgment secured on publication of summons does not appear from the fact that defendant's place of residence might have been ascertained by the plaintiff, where plaintiff and his counsel made diligent effort to ascertain the same without success, and where defendant had actual knowledge of the pendency of the suit thirteen days before the default. *Jordan v. Hutchinson*... 373

JUDGMENT—CONTINUED.

4. JUDGMENT—VACATION—AS MATTER OF RIGHT ON PUBLICATION OF SUMMONS—ACTIONS FOR RECOVERY OF LAND—STATUTES—CONSTRUCTION. Bal. Code, § 5518, giving an absolute right to vacate a judgment had upon the publication of summons in an action to recover the possession of land, has no application to a judgment in an action to set aside conveyances for fraud and subject land to the lien of judgments. *Id.*..... 373
5. JUDGMENT—VACATION—APPEAL—RECORD—FAILURE TO SHOW WANT OF JURISDICTION. Upon appeal from a judgment entered upon findings of fact and conclusions of law, regular on its face, and apparently entered upon the service of due process, it will be presumed that the court acted within its jurisdiction where the appellant brings up in the record only the summons, affidavit of service, decree, notice of appeal, and motion to vacate for defects in the summons, and falls to show affirmatively that the court acted without jurisdiction, there being nothing to show that it was a default judgment, or that there was no appearance or no subsequent summons. *Snider v. Badere*..... 130
6. JUDGMENTS—REVIVAL—CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—STATUTES—VALIDITY OF PART. Laws 1897, p. 52, repealing the statute authorizing the revival of judgments, being a uniform piece of legislation taking away all right of action upon all judgments, and void as impairing the obligation of the contract as respects prior judgments, is void as to section 4, repealing the remedy of revival by notice and motion. *Fischer v. Kittinger*.. 174
7. JUDGMENTS—REVIVAL—CHANGE OF LAW—CONTRACTS—IMPAIRMENT OF OBLIGATION—STATUTES—REPEAL. The act of 1897 repealing the law for the revival of judgments, was an impairment of the obligation of, and unconstitutional as to, existing contracts, and a judgment thereon, although entered after the passage of the act, may be revived on motion notwithstanding the repealing statute. *Williams v. Packard*..... 217
8. JUDGMENTS—REVIVAL—LIMITATION OF ACTIONS—CHANGE OF REMEDY IN JUDGMENT ON TORT—CONSTITUTIONAL LAW—CONTRACTS—IMPAIRMENT OF OBLIGATION. Laws 1897, p. 52, repealing the statute with reference to the revival of judgments, and forbidding any action upon a judgment after a stipulated time, is not unconstitutional as to existing judgments founded upon tort, since the obligation of a contract is not impaired, and the remedy may be changed at the will of the legislature. *Gaffney v. Jones*..... 587

JUDICIAL NOTICE:

Of judgment, see EJECTMENT, 1.

JURISDICTION:

- See **MANDAMUS**, 1, 3.
- Amount in controversy, validity of tax or statute, see **APPEAL AND ERROR**, 1, 2.
- Custody of children of divorced parents, see **DIVORCE**, 3, 5, 6.
- Decedents' estates, see **EXECUTORS AND ADMINISTRATORS**, 1, 2, 8.
- Effect of appearance, see **APPEARANCE**, 1.
- Order without pleading or process, see **COURTS**, 1.
- Supreme court, see **PROHIBITION**, 1, 2.
- In tax foreclosure, see **TAXATION**, 1.
- When presumed, see **JUDGMENT**, 5.

JURY:

- Disqualification or misconduct ground for new trial, see **NEW TRIAL**, 1.
 - Failure to demand, see **TRIAL**, 1, 2.
 - Fees as costs, see **COSTS**, 1.
 - Instructions in civil actions, see **CARRIERS**, 6, 7, 10; **DAMAGES**, 3, 10, 11; **FIXTURES**, 4; **MALICIOUS PROSECUTION**, 1; **MASTER AND SERVANT**, 21-26; **MUNICIPAL CORPORATIONS**, 5, 6; **TRIAL**, 9.
 - Instructions in criminal prosecutions, see **CRIMINAL LAW**, 8, 29-31.
 - Questions for jury, see **CONTRACTS**, 4, 5; **CRIMINAL LAW**, 29, 33; **MASTER AND SERVANT**, 17, 28; **SALES**, 4.
 - Counsel reading law to, see **TRIAL**, 4, 9.
 - Verdict in civil actions, see **TRIAL**, 8.
 - Verdict in criminal prosecutions, see **CRIMINAL LAW**, 33, 34.
1. **JURORS — CHALLENGE — QUALIFICATIONS — FREEHOLDERS — PRESUMPTIONS.** It is not error to refuse to sustain a challenge to a juror because he is not a householder, since he is competent, under Laws 1901, p. 32, if he is a freeholder, which qualification will be presumed in aid of the judgment, unless the contrary affirmatively appears. *McKnight v. Seattle*..... 516

KNOWLEDGE:

- See **ESTOPPEL**, 9.
- As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 8-10.
- Of corporation of malicious prosecution by officers, see **CORPORATIONS**, 6, 7.
- Of incompetency of servant, see **MASTER AND SERVANT**, 5.
- Of relation of independent contractor as affecting servant's action for personal injuries, see **MASTER AND SERVANT**, 36.
- Of keeper of vicious dog imputable to master, see **ANIMALS**, 1.
- Ownership of land, see **ADVERSE POSSESSION**, 1.

LABOR:

- On public work, see **INDEMNITY**, 6, 7.

LACHES:

- See ESTOPPEL, 1.
- Delay in bringing suit, see RAILROADS, 2.
- Discovery of fraud, see CORPORATIONS, 5.

LAND COMMISSIONER:

- Powers, mandamus, see PUBLIC LANDS, 2.
- Lease of school lands, see PROHIBITION, 1, 2.

LANDLORD AND TENANT:

- Mechanics' lien on leasehold, see TENANCY IN COMMON, 1.
- Receiver to collect rents, see CHATTEL MORTGAGES, 1.

LANDS:

- See PUBLIC LANDS.

LEASES:

- Chattel mortgage of, foreclosure, see CHATTEL MORTGAGES, 1.
- Of school lands, see PUBLIC LANDS, 2; PROHIBITION, 1, 2.

LETTERS:

- Acceptance of proposals for contract, see CONTRACTS, 1.
- Admissibility, see EVIDENCE, 1, 2; Contents previously admitted, see CRIMINAL LAW, 32.

LEVY:

- Of tax by city, see MUNICIPAL CORPORATIONS, 10-12.

LICENSES:

- To practice dentistry, see CRIMINAL LAW, 9, 24.

LIENS:

- See MECHANICS' LIENS.
- Tax lien, see TAXATION, 1, 2.
- Of trustee for expenditure on mining claim, see CONTRACTS, 8-10.

LIMITATION OF ACTIONS:

- See ADVERSE POSSESSION.
 - Actions on bonds, see INDEMNITY, 4.
 - Boundary, see BOUNDARIES, 1.
 - Criminal prosecutions, see CRIMINAL LAW, 24.
 - Time for instituting election contest, see ELECTIONS, 1.
1. LIMITATION OF ACTIONS—ACCRUAL—BY MASTER AGAINST SERVANT FOR INDEMNITY—PAYMENT OF JUDGMENT. An action does not accrue in favor of a master against a servant on account of injury to a third person, caused by the servant's negligence, until the master has been compelled to pay the party injured, and under Bal. Code, § 4805, is not barred until two years thereafter. *Gaffner v. Johnson*..... 437

LOGS AND LOGGING:

- Cutting timber on public land, see **CONTRACTS**, 2.
- Injury to servant, see **DAMAGES**, 6; **MASTER AND SERVANT**, 17.
- Obstruction of navigable slough, see **WATERS**, 1-3.
- Sale of standing timber, see **SALES**, 1, 2.

LOSS:

- Of goods at sea, see **CARRIERS**, 5.
- Of time, damages for, see **DAMAGES**, 1, 3.

MALICIOUS PROSECUTION:

See **CORPORATIONS**, 6-7.

1. **MALICIOUS PROSECUTION—PROBABLE CAUSE—INSTRUCTIONS—HARMLESS ERROR.** In an action for malicious prosecution, error cannot be predicated upon an instruction to the jury concerning probable cause, in that it was a question of law for the court, where the instruction was correct and the question was properly decided. *Nickelson v. Cameron Lumber Co.*..... 569

MANDAMUS:

- Compelling tax levy to pay warrants, see **MUNICIPAL CORPORATIONS**, 10-12.
- To state land commissioner, see **PROHIBITION**, 1, 2; **PUBLIC LANDS**, 2.
- 1. **MANDAMUS—TO COMPEL PROSECUTION OF CRIMES—SUNDAY LAWS—ENFORCEMENT—NEGLECT OF DUTY A MISDEMEANOR.** Mandamus will not lie to compel peace officers to prosecute all persons violating the laws respecting the keeping of places of business open and selling goods and liquors, etc., on Sunday, since no specific thing is pointed out to be done, and mandamus does not lie to compel a general course of official conduct, and since Bal. Code, § 7252, provides a specific remedy by making neglect of such official duty a misdemeanor. *State ex rel. Hawes v. Brewer*..... 65
- 2. **MANDAMUS—PLEADING—DEMURRER—PRACTICE.** Common law forms of pleading being abolished, sustaining a demurrer to a writ or affidavit in mandamus is permissible, being in effect the quashing of the writ. *Id.*..... 65
- 3. **MANDAMUS—WHEN LIES—ATTACKING JUDGMENT AFFIRMED ON APPEAL.** After the final settlement of an estate, mandamus will not lie to compel the payment of a temporary allowance to a widow, pursuant to a former order requiring payment until final settlement, upon the theory that the order of final settlement was void, for various reasons, where, upon an appeal from such final order, the same had been affirmed, and all the questions raised determined. *State ex rel. Drasdo v. Frater*..... 594

MANDATE:

See **MANDAMUS**.

MANSLAUGHTER:

Evidence, see **CRIMINAL LAW**, 18, 30, 31.

MANUFACTURES:

Condemnation for, see **EMINENT DOMAIN**, 4.

MARITIME CONTRACTS:

Indemnity against actions for negligence, see **INDEMNITY**, 5.

MARRIAGE:

See **DIVORCE**.

Evidence of, see **CRIMINAL LAW**, 20, 22.

MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Accident insurance, prejudicial statements of counsel, see **TRIAL**, 5.

Accrual of action against servant, see **LIMITATION OF ACTIONS**.

Contribution from employer for penalty paid, see **CONTRIBUTION**, 1.

Insurance against accidents, see **INDEMNITY**.

Personal injuries, instructions to jury, see **DAMAGES**, 10, 11.

Servant's knowledge of vicious dog imputable to master, see **ANIMALS**, 1.

1. **MASTER AND SERVANT—CHILD LABOR—FACTORY ACT—CONSTRUCTION.** The factory act, Laws 1903, p. 261, providing that children under fourteen years of age shall not be "hired out" is intended to forbid their employment, as well as hiring out by parents, and the prohibition extends to all connected therewith, making the employment itself illegal. *Kirkham v. Wheeler-Osgood Co.*..... 415
2. **MASTER AND SERVANT—NEGLIGENCE—VIOLATION OF STATUTORY DUTY—GUARDING MACHINERY—ASSUMPTION OF RISK.** The defense of assumption of risk is not available to a master where the servant is injured by reason of the master's failing to comply with the factory act, Laws 1903, p. 40, requiring operators of mills to place safeguards over cogs, gearings, and shaftings that can be properly safeguarded (*Root, Rudekin and Crow, JJ.*, dissenting). *Hall v. West & Slade Mill Co.*..... 447
3. **MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE SAW—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to sustain a finding of defendant's negligence where it appeared that the trim saw which plaintiff operated wobbled at times, and long prior to the accident had been warped, buckled, and otherwise injured, and was dangerous to use, and complaint had been made thereof. *Prior v. Egert.*..... 481

MASTER AND SERVANT—CONTINUED.

4. SAME—NEGLIGENCE OF FOREMAN IN STARTING MILL—WARNING.
Negligence cannot be predicated on the act of a foreman in starting a mill while an employee was in the act of removing a belt from a pulley, where it appears that a signal for the starting was given and the mill was running two or three minutes before the servant was injured, who therefore had ample notice, and where the belt could have been safely removed while the mill was in motion. *Stratton v. Nichols Lumber Co.*..... 323
5. MASTER AND SERVANT—NEGLIGENCE—EMPLOYMENT OF INCOMPETENT FELLOW SERVANTS—NOTICE OF INCOMPETENCY. There is no evidence upon which to submit to the jury an issue as to the negligence of the owner of a mill in employing an incompetent sawyer, where it appears that he was competent at the time he was employed; and that the employer had no knowledge of his becoming incompetent by reason of the use of intoxicating liquors, as alleged. *O'Brien v. Page Lumber Co.*..... 537
6. SAME—VICE PRINCIPAL AND FELLOW SERVANTS—SAWYER IN CONTROL OF ONE OF HIS CREW—SAFE PLACE—DUTY TO WARN OF AGENCY RENDERING PLACE UNSAFE. A sawyer in control of a saw crew, while a fellow servant with the members of the crew in respect to their labor in working together in the common employment of converting logs into lumber, is nevertheless a vice principal as to the duty to give warning of his operation of the machinery, where it appears that the men were bound to obey his orders, that he ordered the plaintiff, a dogger, to remove a log from the head-block where it had been lodged by the operation of the nigger, a powerful machine under his control, and that, while the dogger was so engaged, with his back to the sawyer, the sawyer, without warning, operated the machinery and applied the nigger to the log at a time when it was evident that the plaintiff's position would thereby be rendered extremely dangerous, and from which injury to him resulted; since after ordering the servant into a dangerous position, it was the duty of the master to keep the place safe and to warn the servant of the use of an agency by the master which would render such place unsafe; the sawyer's negligence in respect to such warning being the act of a vice principal, the peril of which was known to him as such, and unknown to the servant, and being the negligence that rendered the place unsafe. *Id.*..... 537
7. SAME—MASTER AND SERVANT—VICE PRINCIPAL. The third officer of a vessel in charge of unloading lumber is a vice principal, and his negligence in conducting the work must be imputed to the master. *Carlson v. White Star Steamship Co.*..... 394
8. MASTER AND SERVANT—NEGLIGENCE—OPEN AND OBVIOUS DANGERS—ASSUMPTION OF RISKS. Where the dangers incident to the employment are alike open and obvious to the master and servant, the

MASTER AND SERVANT—CONTINUED.

- parties are upon an equality, and the master is not liable for an injury to the servant resulting therefrom. *Tham v. Steeb Shipping Co.*..... 271
9. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—HAULING HAND-CAR BEHIND TRAIN. A bridge carpenter of six months experience in railroad work who undertakes to "hook on" or haul a hand-car behind a freight train by hand, assumes the risk of being jerked off the car, as an open and apparent one, although he acts upon the orders of his foreman, under earnest protest against so doing, and upon assurances that it was safe; since the undertaking was so extremely hazardous as not to justify his reliance upon the master's superior knowledge or to forego the risk of discharge on disobedience of the order. *Lee v. Northern Pac. R. Co.*..... 388
10. SAME—DUTY TO FURNISH SAFE PLACE—ASSUMPTION OF RISK—SERVANT WORKING UNDER HEAVY STEEL PLATE BEING PUT IN PLACE BY INDEPENDENT CONTRACTOR—USE OF UNSAFE APPLIANCE BY CONTRACTOR—KNOWLEDGE OF SERVANT—CONSTANTLY CHANGING DANGERS IN CONSTRUCTION OF SHIP. A carpenter employed by the defendant, a corporation engaged in building a battleship, assumes the risk of constantly changing dangers in the progress of the work, and cannot recover for injuries sustained on the theory that the defendant failed to provide a safe place, where it appears that plaintiff, whose work was constantly shifting from place to place, was working at the time of the accident directly under a heavy steel plate, which was being put in place by employees of an independent contractor, that plaintiff, after helping steady the plate, resumed his work beneath the same, and that the danger was open and as apparent and well known to the plaintiff as to the defendant, the place being rendered unsafe for the moment only, and by reason of the negligence of the employees of an independent contractor, which fact was unknown to the defendant. *Miller v. Moran Bros Co.*..... 631
11. SAME—TWO METHODS, ONE SAFE—CONTRIBUTORY NEGLIGENCE. Where a laborer in a mill came in contact with a set screw upon a revolving shaft, while executing an order to remove a belt from a pulley and tie it back, by reason of standing on a nearby rack, and it appears that he might have executed the order without coming near the shaft, by standing upon benches below the belt, which method was perfectly safe, he is guilty of contributory negligence precluding a recovery. *Stratton v. Nichols Lumber Co.*..... 323
12. SAME—CONTRIBUTORY NEGLIGENCE. Where servants of a lighterage company were working in a narrow place, receiving lumber from a vessel, and had no voice in the matter of how it was to be unloaded, they were not guilty of contributory negligence in attempting to handle, as best they could, a big stick sent down without notice in an improper manner against their protest, and which was caught and thrown about in a violent manner that they could not have anticipated. *Carlson v. White Star Steamship Co.*..... 394

MASTER AND SERVANT—CONTINUED.

13. SAME—CONTRIBUTORY NEGLIGENCE—SERVANT MOMENTARILY FORGETTING UNGUARDED SET SCREW. A mill hand whose duty required him to constantly work about a shafting and who had knowledge of an unguarded set screw therein, is not guilty of contributory negligence in coming in contact with such set screw, in a moment of forgetfulness while lifting a heavy timber, where he did not assume the risk of injury therefrom, by reason of the fact that the master had failed to comply with the factory act requiring such shafting to be guarded. *Hall v. West & Slade Mill Co.*..... 447
14. MASTER AND SERVANT—NEGLIGENCE—DEATH OF BRAKEMAN MAKING FLYING SWITCH—CONTRIBUTORY NEGLIGENCE—WRONG SIGNAL BY DECEASED. There can be no recovery for the death of a brakeman, on account of his contributory negligence in assisting in making a flying switch, where it appears that deceased (who was practically in charge of the operation), contrary to his duty, gave the signal to go ahead before uncoupling the car, and in reliance thereon the engineer went ahead, and the other brakeman turned the switch before the car had passed the switch, thereby derailing the car and causing the death. *Stevick v. Northern Pac. R. Co.*..... 501
15. SAME—FELLOW SERVANT. If such accident was caused by the negligence of the other brakeman, the result would be the same, since he was a fellow servant of the deceased. *Id.*..... 501
16. SAME—CONTRIBUTORY NEGLIGENCE OF SERVANT IN WORKING UNDER SUSPENDED STEEL PLATE IN CONSTRUCTION OF SHIP. An employee, a carpenter, engaged on work about the construction of a ship, is guilty of contributory negligence, where he, with full knowledge of the danger, voluntarily assumes a position underneath a steel plate weighing two thousand pounds, momentarily suspended while being put in place; no emergency or order in justification being shown. *Miller v. Moran Bros. Co.*..... 631
17. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTIONS FOR JURY. In an action for personal injuries sustained by a logger caught between a log and a car, by reason of slack in a cable upon the drum of a logging engine, the minds of reasonable men may differ, and the evidence makes a case for the jury, on the questions of negligence, contributory negligence, assumed risk, and negligence of a fellow servant, where witnesses testified that the drum was constructed to be used with a brake to take up the slack in the cable, that the appliances used in place of a brake upon the drum were unsafe and dangerous, that plaintiff knew nothing whatever concerning them or their operation, that the fellow servant, the engineer, operated the same with due care and took up all slack in the cable before applying the power, and that the plaintiff was injured through the failure of the appliances to take up the slack as would have been done in case the brake or a suitable appliance

MASTER AND SERVANT—CONTINUED.

- had been used, notwithstanding evidence that it was not customary to use a brake, the same being dispensed with to lessen the labor of the loading crew. *Hart v. Cascade Timber Co.*..... 279
18. MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE—CONJECTURE—INJURY FROM SET SCREW. Where a laborer in a mill is killed by reason of coming in contact with a set screw upon a revolving shaft, while executing an order to remove and tie back a belt from a pulley, and no one saw the accident or knew how he happened to come in contact with the set screw, a verdict for the plaintiff must be set aside; since no explanation of the accident can be made except by speculation, surmise, or guess. *Stratton v. Nichols Lumber Co.*..... 323
19. SAME. It cannot be argued that it was necessary for him to stand upon the rack in order to reach and remove the belt which was tight, when it appears that the belt was loosened and already removed, and could be reached from below, and was tied on one side before the accident. *Id.*..... 323
20. MASTER AND SERVANT—CHILD LABOR—FALSE REPRESENTATION OF MINOR AS TO AGE—ESTOPPEL IN PAIS. In an action for injuries to a child under fourteen years of age, employed contrary to the provisions of the factory act, it is no defense that the child represented himself as being over fourteen, since estoppel *in pais* growing out of contracts does not operate against a minor. *Kirkham v. Wheeler-Osgood Co.*..... 415
21. MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE OF TENDER YEARS—WARRANTY—INSTRUCTIONS. In an action for personal injuries sustained by an employee twelve years of age, a charge to the jury that it is not enough to give general instructions as to dangers, but that they should have been such as to satisfy a careful person that he was familiar with the exact danger, is not objectionable taken as a whole, as assuming as a matter of law that general instructions are not sufficient. *Id.*..... 415
22. SAME—DUTY TO PROTECT. A disconnected portion of a charge to the jury to the effect that defendant owed the duty to protect plaintiff from risks which one of his age did not properly appreciate, may not be objectionable as an assumption that he did not appreciate the dangers. *Id.*..... 415
23. SAME—DEGREE OF CARE. In an action for personal injuries sustained by an employee twelve years of age, who had had no experience in a factory, an instruction that the degree of care owed by the defendant is much greater than is due an adult is not prejudicial especially where the degree of care was afterwards correctly stated. *Id.*..... 415
24. SAME. An instruction, informing the jury as to the facts and circumstances that they might take into consideration in determin-

MASTER AND SERVANT—CONTINUED.

- ing the degree of care required, is not open to the objection that it gives no rule for the guidance of the jury, when the court declared that the ordinary care required was such as an ordinarily prudent person would use under the circumstances. *Id.*..... 415
25. SAME—CONTRIBUTORY NEGLIGENCE. A charge on the subject of contributory negligence, that the burden of proof is upon the defendant to prove that the plaintiff was injured by his own negligence, and not by the negligence of the defendant, does not limit the defense to cases where defendant is not negligent, when explained by a fuller correct explanation of contributory negligence. *Id.*..... 415
26. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS. A charge that the defense of contributory negligence must be proved by defendant, by a preponderance of the evidence, is not objectionable as charging that it must be proved by defendant's evidence. *Prior v. Eggert*..... 481
27. MASTER AND SERVANT—NEGLIGENCE—JOINT ACTION AGAINST FOR NEGLIGENCE OF SERVANT—VERDICT EXONERATING SERVANT AND AGAINST MASTER—LEGAL EFFECT. In an action against a railroad company and its master mechanic for the wrongful death of a brakeman, a verdict in favor of the master mechanic and against the railroad company exonerates the company, precluding any recovery against it, where it is alleged in the complaint and admitted that it was the duty of the master mechanic to keep the engines in proper repair, and the only negligence alleged is that of the master mechanic in failing to repair an engine to prevent escaping steam, by reason of which the death was caused. *Stevick v. Northern Pac. R. Co.* 501
28. MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—NEGLIGENCE OF SERVANT—UNLOADING LUMBER—EVIDENCE OF NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries sustained through the fall down a hill of a load of lumber, being delivered by the defendant's teamster to the plaintiff, at the edge of a steep bluff, there is sufficient evidence to sustain a verdict for the plaintiff, where it appears that the wagon was so constructed that the entire load could be unloaded at one time, that the teamster had commenced to unload by throwing pieces down the hill, that plaintiff, after giving directions as to the manner of unloading, went down the hill to straighten boards thrown down, and while there with notice to the teamster, the entire load was unloaded at once, and slipped down the hill, striking the plaintiff and causing the injury, and where the jury inspected the premises, and the hill was not so steep but that persons could walk up or down, and were in the habit of doing so; and the questions of negligence and contributory negligence are for the jury. *Dumontier v. Stetson & Post Mill Co.*.... 264

MASTER AND SERVANT—CONTINUED.

29. SAME—LIABILITY OF MASTER TO THIRD PERSONS. Defendant, who sold a load of lumber to the plaintiff, is liable for personal injuries sustained by the plaintiff through the negligent acts of the defendant's servant in unloading the lumber. *Id.*..... 264
30. SAME—NEGLIGENCE—COMMON UNDERTAKING—INJURY TO SERVANT OF INDEPENDENT CONTRACTOR—MASTER AND SERVANT—VICE PRINCIPAL. The owner of a ship whose crew is engaged with the servants of a lighterage company in unloading lumber, is engaged in a common undertaking, and owes the duty to exercise care in its part of the work; and it is liable to the servants of the lighterage company for negligently sending down a heavy stick of timber, by shoving it through a porthole by hand to be received in a narrow place by an insufficient number of men, where machinery and appliances were available for handling the same with safety. *Carlson v. White Star Steamship Co.*..... 394
31. SAME—CONCURRENT NEGLIGENCE OF INDEPENDENT CONTRACTOR. In such case, the negligence of the lighterage company in not employing a sufficient number of men does not release the ship owner from liability for its own negligence. *Id.*..... 394
32. MASTER AND SERVANT—SERVANT INJURED BY NEGLIGENCE OF INDEPENDENT CONTRACTOR—OBLIGATION TO FURNISH INDEPENDENT CONTRACTOR WITH APPLIANCES—SELECTION OF IMPROPER APPLIANCE BY SERVANTS OF INDEPENDENT CONTRACTOR. A master is not liable to its servant, injured by the negligence of employees of an independent subcontractor on part of the work in making use of unsafe appliances, where it appears that the agreement with the independent contractor did not require the master to furnish the appliances, and that suitable appliances were on the premises and no request was made therefor upon any of the master's officers or foremen, but the improper appliances used were selected by employees of the independent contractor without the knowledge of the master. *Miller v. Moran Bros. Co.*..... 631
33. SAME—OBLIGATION TO INDEPENDENT CONTRACTOR. The duty of a master, who delegates part of the work to an independent contractor, to furnish him with suitable appliances would not render the master liable to his own employees for negligence of the independent contractor in respect to appliances used, although the master retained and exercised general supervision over the work, when the choice of methods was left entirely to the independent contractor. *Id.*... 631
34. SAME. There is no violation of a master's duty to furnish an independent contractor with suitable appliances for carrying on the work, by reason of the fact that none were at the tool house when sent for, where there was no request therefor made upon any of the master's officers or foremen. *Id.*..... 631

MASTER AND SERVANT—CONTINUED.

35. **SAME.** The fact that a master had been furnishing appliances to an independent contractor would not render the master liable to its own employee for the negligence of the independent contractor in furnishing an unsafe device. *Id.*..... 631
36. **SAME—KNOWLEDGE OF RELATION.** An employee, injured through the negligence of employees of an independent contractor, cannot sustain an action against his employer by showing that he was not aware of the relation between the defendant and the independent contractor. *Id.*..... 631

MEASURE OF DAMAGES:

See **DAMAGES**, 1-3.

MECHANICS' LIENS:

Foreclosure against cotenants, see **TENANCY IN COMMON**, 1.

Public work, see **INDEMNITY**, 6, 7.

1. **MECHANICS' LIENS—FORECLOSURE—DEFENSES—PLEADING—SUPPLEMENTAL ANSWER SHOWING PAYMENTS—STIPULATION FOR CREDITS PRIOR TO ENTRY OF JUDGMENT—WAIVER.** In an action to foreclose mechanics' liens, where the parties agreed in writing that judgment be postponed and that payments made should be credited on the liens before the entry of judgment, it is error, on plaintiff's motion for judgment, to refuse the defendants leave to file a supplemental answer showing payments made since the commencement of the action which had not been credited; and the original answer admitting the amount due on the liens did not waive the enforcement of the contract. *Burnett v. Ewing*..... 45
2. **SAME—CREDITING NOTE ASSIGNED AS COLLATERAL.** In such a case, the defendants are not entitled to have a note, assigned as collateral security, credited on the liens, without a showing that the note had been paid or converted to the plaintiff's use. *Id.*..... 45

MINES AND MINERALS:

Agreement to locate claims, see **CONTRACTS**, 8-10.

MINORS:

See **INFANTS**; **MASTER AND SERVANT**, 1, 20-23.

Actions by, see **PARTIES**, 1.

MISCONDUCT:

Of counsel, see **TRIAL**, 4-6.

MISDEMEANOR:

See **MANDAMUS**, 1.

MISREPRESENTATION:

Inducing sale, see **SALES**, 1.

MISTAKE:

See ADVERSE POSSESSION, 1, 2.

Ground for new trial, see JUDGMENT, 11.

In bond on public work, see INDEMNITY, 6, 7.

MODIFICATION:

Of contract, see SALES, 3; STATES, 2.

Of judgment or order on appeal, see APPEAL AND ERROR, 39-41.

MORTGAGES:

Foreclosure of interest of parties under void partition, see APPEAL AND ERROR, 38.

Of infant's real estate, see INFANTS, 1.

Personal property, see CHATTEL MORTGAGES.

Purchaser at sale, color of title, see ADVERSE POSSESSION, 3.

Subrogation to rights of mortgagee, see SUBROGATION.

MOTIONS:

Continuance in civil actions, see CONTINUANCE.

Dismissal of appeal, striking statement of facts, see APPEAL AND ERROR, 1, 2, 7, 11, 12, 15-17.

Dismissal or nonsuit on trial, see TRIAL, 7.

New trial in civil actions, see NEW TRIAL.

Opening or vacating judgment, see JUDGMENT.

MUNICIPAL CORPORATIONS:

See COUNTIES; SCHOOLS AND SCHOOL DISTRICTS.

Action for negligence, surprise, see NEW TRIAL, 6.

Appointment and removal of officers, see OFFICERS, 1-3.

Assessment, review, remand, see APPEAL AND ERROR, 42.

Compelling officers to enforce law, see MANDAMUS, 1.

Damages from defective sidewalk, see DAMAGES, 7.

Public work, bonds, see INDEMNITY, 6, 7.

1. MUNICIPAL CORPORATIONS—ASSESSMENTS—APPEAL FROM CONFIRMATION—TRIAL IN SUPERIOR COURT—NEW EVIDENCE. Upon appeal from a municipal assessment the appellant is entitled to a trial on new evidence submitted by him, and is not confined to the record certified from the city council. *Ahrens v. Seattle*..... 168
2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—APPEAL TO SUPERIOR COURT—NOTICE—SUFFICIENCY. A notice of appeal from a municipal assessment need not recite the names of all the appellants, but a substantial compliance with the statute is sufficient. *Harris v. Tacoma*..... 185
3. SAME—FILING OF TRANSCRIPT AND BOND. Upon an appeal from a municipal assessment it is not essential that the transcript and bond be filed at the same time, and the filing of the bond two days before the transcript is not ground for dismissal. *Id.*..... 185

MUNICIPAL CORPORATIONS—CONTINUED.

4. SAME—PARTIES—JOINDER OF OBJECTORS. All parties interested in objections to a municipal assessment may join in the appeal to the superior court. *Id.*..... 185
5. MUNICIPAL CORPORATIONS—BRIDGES—NEGLIGENCE—DEFECTIVE CONDITION—DUTY OF CITY—INSTRUCTIONS. In an action for personal injuries sustained through the defective condition of a bridge, an instruction not technically accurate, declaring it to be the duty of the city to use reasonable care to keep its bridges in good, safe condition, and to the effect that it would be liable for failure to so keep them in such condition, is not prejudicial error when immediately followed by an instruction that the law did not require the city to keep its bridges absolutely safe, and correctly defining ordinary care and limiting the duty of the city to reasonable and ordinary care in guarding against accidents. *Benson v. Spokane*..... 101
6. SAME—PLEADING AND PROOF—UNESSENTIAL DETAILS—DEFECT THE PRIMARY CAUSE OF THE ACCIDENT—INSTRUCTIONS. In an action for personal injuries sustained by reason of a defect in a bridge, which caused the horse to tip over the buggy, the plaintiff is not required to prove the allegation that the horse stepped into the hole and then violently backed off; and it is proper to instruct that the defendant is liable if the horse shied at the hole without stepping into it provided that the defect was such as to cause an ordinarily gentle horse to shy and the plaintiff was free from negligence; since proof of unimportant details explaining the result is not essential where the defect complained of is the primary cause of the accident. *Id.*.. 101
7. MUNICIPAL CORPORATIONS — NEGLIGENCE — STREETS — LIABILITY FOR DEFECTS IN WALK NOT BUILT BY CITY. A city is liable for personal injuries caused by the defective condition of a sidewalk in a public street, open to the use of the public, although the walk was built by private parties. *McKnight v. Seattle*..... 516
8. MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—DEFECT IN SIDEWALK—NOTICE—GENERAL WANT OF REPAIR. In an action for personal injuries sustained through a defective sidewalk, there was sufficient evidence of notice of the defect, where it appeared that the walk had been for a long time in a defective and dangerous condition, that the planks were decayed and liable to break, and that the city had made no effort to repair it, although it may have had no knowledge of the actual break in time to repair it. *Id.*..... 516
9. MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—FALL FROM TEMPORARY SIDEWALK — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. In an action for personal injuries sustained in a fall, in the night-time, from a temporary unguarded sidewalk, the evidence does not show, as a matter of law, that the plaintiff was guilty of contributory negligence, where she was not aware of the changed and dangerous condition of the street, the night was dark, and no signal lights or guards were provided. *Shaw v. Seattle*..... 590

MUNICIPAL CORPORATIONS—CONTINUED.

10. MUNICIPAL CORPORATIONS—BONDS—LEVY OF TAX TO PAY OUTSTANDING WARRANTS—MANDAMUS TO COMPEL INCREASED LEVY—OUTSTANDING TAXES AS ASSETS—PLEADING—SUFFICIENCY. The holder of municipal bonds is not entitled to a writ of mandate compelling the city council to assess and levy a tax to the full amount allowed by law, upon alleging that the tax levy decided upon is insufficient to pay the outstanding warrants and interest, without further showing that the outstanding unpaid taxes previously levied are inadequate or that the remedies for the collection thereof have been exhausted; since unpaid taxes are presumed available as assets, and the full levy is not mandatory when the payment may have been amply provided for. *State ex rel. American etc. Mtg. Co. v. Mutt*y..... 624
11. SAME—PLEADING—DEMURRER—WARRANTS PRIMA FACIE VALID CLAIM. An application for a writ of mandate to compel a levy to provide payment of a municipal debt, shows a *prima facie* valid claim against the city by setting out the warrants, as against a demurrer. *Id.*..... 624
12. SAME—DISCRETION OF COUNCIL. It is not incumbent upon the council to levy to the full amount allowed by law until the warrants are fully paid, irrespective of assets provided, since that would lead to taxation burdensome upon those who pay promptly, the remedy of the warrant holders being against the collecting officers. *Id.*.. 624

MURDER:

See CRIMINAL LAW, 30, 31.

NAMES:

Taking title to and conveying land in assumed name, see DEEDS, 1, 2.

NATIONAL BANKS:

See BANKS AND BANKING, 1.

NAVIGABLE WATERS:

Obstructions, justification for destroying fish traps, see WATERS, 4, 5.

NEGLIGENCE:

See CARRIERS, 6-9.

Collision of vessels, see COLLISION, 1.

Employers, see MASTER AND SERVANT.

Of factor, see FACTORS, 1.

In conduct of case, see ESTOPPEL, 5.

Indemnity, costs of defending suit, see INDEMNITY, 5.

Of independent contractor, see MASTER AND SERVANT, 31-36.

Measure of damages, see DAMAGES, 1-3.

Owner of vicious dog, see ANIMALS, 1.

Of person injured by operation of street railroad, see STREET RAILROADS, 1.

Of servant, see MASTER AND SERVANT.

Sidewalks and bridges, see MUNICIPAL CORPORATIONS, 5-9.

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NEW TRIAL:

See **MASTER AND SERVANT, 18.**

In criminal prosecutions, see **CRIMINAL LAW, 24, 34.**

For error in instructions, see **APPEAL AND ERROR, 28.**

Opening or vacating judgment, see **JUDGMENT, 11, 12.**

Review on appeal, see **APPEAL AND ERROR, 13, 18, 28.**

1. **NEW TRIAL—JURY—MISCONDUCT—PARTY TREATING A JUROR.** A new trial is properly granted for misconduct of a juror where it appears that, during the progress of the trial, he engaged in private conversations, and drank in a saloon, with a party to the suit. *Buchanan v. Laber*..... 410
2. **NEW TRIAL—ACCIDENT AND SURPRISE—ABSENCE OF WITNESS—FAILURE TO REQUEST CONTINUANCE.** Accident and surprise cannot be urged as ground for a new trial in an action for a divorce, in that the appellant's son, alleged to be a material witness, suddenly disappeared during the trial and could not be produced, when the appellant failed to subpoena him as a witness, or to request a continuance, but submitted the case on other evidence without suggesting the fact that he relied upon his son's confidence. *Clemans v. Western*..... 290
3. **NEW TRIAL—INADVERTENCE AND SURPRISE—AFFIDAVIT OF MERITS AFTER ISSUE JOINED.** Upon a motion for a new trial on account of inadvertence and surprise, after issue of fact joined, it is not important that the application does not show a meritorious defense, where both parties considered a trial necessary, and the denials of the complaint required a trial irrespective of the affirmative defenses. *O'Toole v. Phoenix Ins. Co.*..... 688
4. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ABSENT WITNESS—AFFIDAVIT OF—DISCRETION.** The affidavit of the witness, or good cause for its nonproduction, being required by Bal. Code, § 5076, it is not an abuse of discretion to refuse a new trial on the ground of newly discovered evidence, where the witness lived in Spokane and his affidavit was not produced, after twenty days continuance of the motion, and where the appellant knew of his whereabouts during all said time and merely affirms that the witness was (now) temporarily absent from his place of business and that he had been unable to procure his affidavit after making every effort to do so. *Dumontier v. Stetson & Post Mill Co.*..... 264
5. **SAME—ABSENCE OF WITNESS—REQUEST FOR CONTINUANCE.** It is not an abuse of discretion to refuse a new trial for newly discovered evidence, where the existence of a material witness, who could not be found, was at all times known, and his residence was discovered before the close of the trial, but not in time to produce

NEW TRIAL—CONTINUED.

- him, and the appellant did not seek a continuance on account of the absence of the witness or ask any postponement of the trial for the purpose of producing the evidence. *Id.*..... 264
6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—WHEN PROPERLY GRANTED ALTHOUGH THE NEW EVIDENCE IS PARTLY CUMULATIVE. It is not an abuse of discretion to grant a new trial for newly discovered evidence, after a verdict for the defendant, in an action for personal injuries sustained in a fall upon a wooden sidewalk, where six or eight witnesses had testified for the defendant to the effect that a cement walk had been laid and completed at the place in question at the time of the accident, and the newly discovered evidence was that of a city claim agent and of a city inspector, who investigated the case for the city and were not called as witnesses, and who had admitted, and would testify, that at the time of their investigation of the case the cement walk had not been completed. *Brennan v. Seattle*..... 640
7. SAME—DILIGENCE. In such a case lack of diligence is not shown by affidavits to the effect that the claim agent called upon the plaintiffs shortly after the accident and was directed to the place, where the affidavits are conflicting, and plaintiffs did not see him at the place or have any knowledge of the inspector. *Id.*..... 640
8. SAME—CUMULATIVE EVIDENCE. Such testimony is not purely cumulative, since it establishes a condition at a subsequent date corroborative of the evidence of the plaintiffs as to the condition at the time of the accident. *Id.*..... 640
9. SAME—DISCRETION OF THE COURT. The granting of a new trial should not be reversed as an abuse of discretion, if the ends of justice are subserved, although not warranted under a strict construction of the procedure according to the letter of the law. *Id.*.... 640
10. SAME—PROCURING AFFIDAVITS OF NEW WITNESSES—EVIDENCE AGAINST INTEREST. Upon an application for a new trial on account of newly discovered evidence, it is a sufficient excuse for failure to produce the affidavits of the witnesses that they were in the employ of the adverse party and their evidence would be against the interest of their employer. *Id.*..... 640
11. JUDGMENT—VACATION—INADVERTENCE AND SURPRISE—MISTAKE IN NOTIFYING COUNSEL OF DATE OF TRIAL AS AGREED UPON—EXCUSABLE NEGLIGENCE—ABUSE OF DISCRETION. It is an abuse of discretion to refuse to grant a new trial on the ground of inadvertence and surprise, where the defendant's failure to appear at the time the cause was set for trial was due to an excusable misunderstanding between counsel, arising in their correspondence, plaintiff's counsel having agreed to give notice of the time, and having sent a telegram to the wrong place, which was not delivered, instead of writing as they stated they had, and defendant's counsel having held himself and a

NEW TRIAL—CONTINUED.

witness in readiness awaiting such notice; a liberal rule applying in furtherance of justice when the showing is not manifestly insufficient. *O'Toole v. Phoenix Ins. Co.*..... 688

12. **SAME—IMPOSITION OF TERMS.** Upon granting a new trial for inadvertence or surprise not due to the fault of the adverse party, the terms imposed should be the payment of the adverse party's costs. *Id.*..... 688

NEXT OF KIN:

Rights, who may assert, see **EXECUTORS AND ADMINISTRATORS**, 3.

NONSUIT:

See **EJECTMENT**, 1; **STREET RAILROADS**, 1.

At trial, see **TRIAL**, 7.

Refusal as ground for continuance or amendment, see **CONTINUANCE**, 1.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

See **ELECTIONS**, 1.

Of acts involving loss, see **INDEMNITY**, 4.

Adverse claim of tenant in common, see **ADVERSE POSSESSION**, 2.

Of appeal from municipal assessments, see **MUNICIPAL CORPORATIONS**, 2, 4.

Of defects, see **SALES**, 4.

Claims of materialmen, filing, action on bond, see **INDEMNITY**, 7.

Of defects in streets, see **MUNICIPAL CORPORATIONS**, 8.

Of hearing on removal of administrator, see **EXECUTORS AND ADMINISTRATORS**, 6.

Of incompetency of servant, see **MASTER AND SERVANT**, 5.

Purchaser of real property, see **VENDOR AND PURCHASER**, 1, 2.

Of tax foreclosure, see **TAXATION**, 1.

Of title to public land, see **CONTRACTS**, 2.

Of vicious propensity, see **ANIMALS**, 1.

NUISANCE:

Injunction, stay, see **APPEAL AND ERROR**, 10.

Obstruction of stream, see **WATERS**, 1-6.

Smoke and noises, see **EMINENT DOMAIN**, 1, 2.

1. **NUISANCE—INJUNCTION TO ABATE DISORDERLY HOUSE—ADJOINING PROPERTY NOT OCCUPIED—COMPLAINT—SUFFICIENCY** Injunction lies to abate the maintenance of a bawdy house as a public nuisance specially injurious to plaintiff's vacant adjoining property, where it is alleged that plaintiff intends to at once build thereon for residence purposes; and, upon demurrer, such allegation sufficiently shows the certainty of damage to authorize injunction; the remedies at law being inadequate. *Dempste v. Darling*..... 125

OBJECTIONS:

- To assessment for public improvements, see MUNICIPAL CORPORATIONS, 1-4.
- To complaint waived by answering, see APPEAL AND ERROR, 4.
- To defect of parties, see PARTIES, 1, 2.
- To evidence, see CRIMINAL LAW, 17; TRIAL.
- To findings, raised at trial, see INDEMNITY, 1.
- To final settlement, see EXECUTORS AND ADMINISTRATORS, 8.
- Necessity for purpose of review, see APPEAL AND ERROR, 4.

OBSTRUCTIONS:

- Of water course, see WATERS AND WATER COURSES, 1-6.

OFFER:

- Of proof, see TRIAL, 5.
- Proposals for contract, see CONTRACTS, 1.

OFFICERS:

- Corporate officers, fraud of, torts, see CORPORATIONS, 1-7.
 - Discretion of city council in levying taxes, remedy of warrant holders, see MUNICIPAL CORPORATIONS, 12.
 - Mandamus affecting, see MANDAMUS, 1.
 - Oyster commissioners, see PUBLIC LANDS, 1.
 - School officers, directors, powers, see SCHOOLS AND SCHOOL DISTRICTS, 1-4.
 - State land commissioner, see PROHIBITION, 1, 2; PUBLIC LANDS, 2.
1. OFFICERS — REMOVAL — MUNICIPAL CORPORATIONS — EMPLOYEES. In the absence of restraints, the power of appointment to an office for an indefinite term implies the power to remove. *Price v. Seattle* 376
 2. SAME—REVIEW BY COURTS. The removal of a municipal employee or officer holding an indefinite term, pursuant to the charter provisions therefor and approved by the civil service commission in the manner directed, is final and cannot be reviewed by the courts, where the charter authorizes the appointing power to make the removal upon the filing of a statement in writing of the reasons therefor, and provides for a hearing before the civil service commission, which has power to approve the removal or reinstate the employee. *Id.* 376
 3. SAME. The right to a hearing before an impartial board does not change the rule that the removal of a municipal officer effected in the statutory manner is final and conclusive on the courts. *Id.* 376

ORDERS:

- See COURTS, 1.
- Review, see APPEAL AND ERROR, 1-3, 5.

OYSTERS:

- Oyster lands, see PUBLIC LANDS 1.

PARENT AND CHILD:

See INFANTS.

Custody of children on divorce, see DIVORCE, 3, 5, 6.

Right of child to recover for death of parent, see DEATH, 1.

PAROL AGREEMENTS:

See FRAUDS, STATUTE OF.

Modifying prior written contract, see STATES, 1, 2.

Oral evidence to vary writing, see SALES, 3.

Proof of, see CONTRACTS, 7.

Varying terms of note, see BILLS AND NOTES, 1.

PARTIES:

Appeal from municipal assessments, see MUNICIPAL CORPORATIONS, 2, 4.

Consignor after sale *in transitu*, see CARRIERS, 2-4.

To contract, see PLEADING 9.

Cotenants, real party in interest, see TENANCY IN COMMON, 1.

Husband and wife, default of husband, see HUSBAND AND WIFE, 2.

Instructions as to one not party, see CARRIERS, 10.

Joinder of father and son in action for death, see ACTION, 2.

Joinder of in prosecution for adultery, see CRIMINAL LAW, 5.

Trial judge as party, see CONTEMPT, 4.

Party treating juror, see NEW TRIAL, 1.

Persons concluded by judgment see JUDGMENT, 2.

Persons entitled to claim by prescription, see ADVERSE POSSESSION, 2

Persons entitled to sue for causing death, see DEATH, 1.

Real party in interest, see CORPORATIONS, 1, 2.

Rights and liabilities as to costs, see COSTS, 1.

Tort of partnership, partners, see ANIMALS, 2.

1. PARTIES — MINORS INTERESTED IN COMMUNITY PROPERTY — HOW BROUGHT IN. Upon objection being made that minors, interested in the community estate of their deceased father, are necessary parties plaintiff, it is proper to appoint their mother guardian *ad litem*, and to join them as parties plaintiff by the filing of an amended complaint. *Zeimantz v. Blake*..... 6
2. PARTIES — DEFECT — PARTNERSHIP — COPARTNERS NOT JOINED IN ACTION OF TORT—WAIVER. One partner, sued for the torts of the copartnership, cannot take advantage of any defect in parties defendant, where the objection was not raised by demurrer or answer. *Grissom v. Hofus*..... 51

PARTITION:

Partition agreement subsequent to contract of sale, see VENDOR AND PURCHASER, 2.

Failure to vacate, when harmless, see APPEAL AND ERROR, 38.

PARTNERSHIP:

Liability of partners for torts of partnership, see ANIMALS, 2.

Torts of, see PARTIES, 2.

PART PERFORMANCE:

See FRAUDS, STATUTE OF, 1, 2.

PASSENGERS:

See CARRIERS, 6-9.

PAYMENT:

See COMPROMISE AND SETTLEMENT, 1; COSTS, 1; MECHANICS' LIENS, 1, 2.

On building contract prior to maturity, see INDEMNITY, 2.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 1, 2.

Of expenses by corporation as ratification of malicious prosecution by manager, see CORPORATIONS, 6.

As part performance, see FRAUDS, STATUTE OF, 1, 2.

Of penalty, see CONTRIBUTION, 1.

Subrogation on payment, see SUBROGATION.

PERSONAL INJURIES:

See DAMAGES.

Action for, see NEW TRIAL, 6.

Caused by operation of street railroad, see STREET RAILROADS, 1.

Conduct of suit for, indemnity, see ESTOPPEL, 2-6.

Pleading, trial amendment, see CONTINUANCE, 1.

Sufficiency of evidence, see APPEAL AND ERROR, 23.

To employee, see MASTER AND SERVANT, 1-27, 30-36.

To passengers, see CARRIERS, 6-9.

To traveler on highways, see MUNICIPAL CORPORATIONS, 5-9.

Vicious dog, see ANIMALS, 1, 2.

PICKETING:

See INJUNCTION, 1.

PLEADING:

See INJUNCTION, 1.

Abatement of nuisance, see NUISANCE, 1.

Amendment, see APPEAL AND ERROR, 35; CONTINUANCE, 1; PARTIES, 1.

Answer of assignee, amendment, see ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

Answer in ejectment, see EJECTMENT, 1.

Application for letters, see EXECUTORS AND ADMINISTRATORS, 4, 5.

Cotenants, see TENANCY IN COMMON.

Defect of parties, waiver, see PARTIES, 2.

Enforcement of mechanic's lien, see MECHANICS' LIENS, 1.

Entry of order without, see COURTS, 1.

Exemptions, sworn statement, see EXEMPTIONS, 1, 2.

Failure to reply, see CORPORATIONS, 1.

For personal injuries, see MUNICIPAL CORPORATIONS, 6.

Forms abolished, see MANDAMUS, 2.

PLEADING—CONTINUED.

Indemnity, conditions precedent, see INDEMNITY, 1.
 Information, sufficiency, see CRIMINAL LAW, 1-7, 25.
 Joinder of causes, see ACTION, 1, 2.
 Mandate to compel tax levy, see MUNICIPAL CORPORATIONS, 10, 11.
 Services of nurse, see DAMAGES, 8.
 To enjoin obstructions, see WATERS, 1.
 Variance, see CRIMINAL LAW, 7, 25.
 Variance, as to ownership of dog, see ANIMALS, 2.
 Waiver by pleading over, see APPEAL AND ERROR, 4.
 Waiver of illegality of contract, see CONTRACTS, 2.

1. PLEADING—ANSWER—REPLY TO DENIAL NOT REQUIRED. In an action upon a promissory note an answer which "denies that there was any consideration . . . but alleges that the same was given for security only," is no more than a denial requiring no reply. *Adams v. Casey*..... 37
2. PLEADING—ANSWER—ADMISSION—CONSTRUCTION—INCONSISTENT AVERMENTS. Express admissions in an answer control direct averments to the contrary, since the pleading must be construed most strongly against the pleader, and in the absence of an amendment evidence contrary to the admission is properly excluded. *Irwin v. Buffalo Pitts Co.*..... 346
3. PLEADING—ANSWER—DEFENSES—WHEN NOT INCONSISTENT—CONTRACTS. In an action upon a written contract to recover commissions for the sale of machinery, a partial defense that the contract contained a provision that ten per cent of any notes taken should be deducted from the commissions, if the note was not paid at maturity and expense was incurred, is not inconsistent with a defense setting up the statute of limitations, settlement, and that the sale was under another contract; and it is error to exclude evidence thereof. *Id.* 346
4. PLEADING—DEMURRER—WAIVER BY ANSWER. A demurrer to a complaint upon a specified ground cannot be made orally at the trial after the filing of an answer basing the defense on other grounds. *Zetmantz v. Blake*..... 6
5. PLEADING—DEMURRER—TRIAL—DISMISSAL ON FAILURE TO AMEND. Where two causes of action are improperly joined, and a demurrer on that ground is sustained, a plaintiff whose complaint stated a good cause of action cannot complain of the dismissal of the action upon sustaining the demurrer, when he elected not to amend his complaint. *Johnson v. Seattle Electric Co.*..... 211
6. PLEADING—AMENDMENT—ISSUES RAISED BY DENIALS—CONTRACTS—PARTIES. In an action on contract, an amendment to an answer to show that the defendant was not a party to the contract is not necessary where the issue was raised by denials. *Vulvan Iron Works v. Burrell Constr. Co.* 319

PLEADING—CONTINUED.

7. PLEADINGS—AMENDMENT—SURPRISE—CONTINUANCE—DISCRETION.
Where plaintiff relies upon an express admission in the answer and insists upon claiming a surprise, a refusal to allow an amendment except upon condition of a continuance, is within the discretion of the court. *Irwin v. Buffalo Pitts Co.*..... 346
8. PLEADING—SUPPLEMENTAL ANSWER—SUFFICIENCY—LEAVE TO FILE.
The fact that a proposed supplemental answer is not sufficiently full and particular to conform to the rules of good pleading is no justification for refusing leave to file it, where it contained the substance of a good defense. *Burnett v. Ewing*..... 45
9. PLEADINGS—VARIANCE—CONTRACTS—PARTIES—ADOPTION OF CONTRACT MADE BY ANOTHER PARTY. In an action upon a contract for the purchase price of castings, alleged to have been sold to the defendant, it is not a variance that the proof showed a contract originally entered into with defendant's president, who afterwards directed the account to be changed, where the goods were consigned to the defendant and part of the correspondence was carried on in its name; since the antecedent negotiations were unessential, and a sale to the defendant was shown. *Vulcan Iron Works v. Burrell Constr. Co.*..... 319

POLICE POWER:

See CONSTITUTIONAL LAW, 1.

POSSESSION:

See ADVERSE POSSESSION.

Boundary, see BOUNDARIES, 1.

As part performance, see FRAUDS, STATUTE OF, 1.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; CONTEMPT, 2-4; CONTINUANCE; COSTS; COURTS, 1; CRIMINAL LAW; DAMAGES; DIVORCE, 1-6; EJECTMENT; EVIDENCE; EXEMPTIONS; INJUNCTION; JUDGMENT; JURY; LIMITATION OF ACTIONS; MANDAMUS; NEW TRIAL; PARTIES; PLEADING; PROHIBITION; RAILROADS, 1; SUBROGATION; TRIAL.

Accounting by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 8-10.

Upon appeal from municipal assessment, see MUNICIPAL CORPORATIONS, 1-4.

Foreclosure of lien, see MECHANICS' LIENS, 1.

Preference of next of kin, see EXECUTORS AND ADMINISTRATORS, 3.

PREJUDICE:

Ground for estoppel, see ESTOPPEL, 6.

Prejudicial statements of counsel to jury, see TRIAL, 5, 6.

PRESCRIPTION:

- Establishment of highways, see **HIGHWAYS**, 1.
- Railroad right of way across public lands, see **ADVERSE POSSESSION**, 6.
- Rights acquired by obstructing stream, see **WATERS**, 3.

PRESUMPTIONS:

- In aid of judgment, see **JURY**, 1.
- Of jurisdiction, see **JUDGMENT** 5.
- Of negligence, see **CARRIERS**, 8.
- As to sanity, see **INSANE PERSONS**, 1.

PRINCIPAL AND ACCESSORY:

- See **CRIMINAL LAW**, 15.

PRINCIPAL AND AGENT:

- See **FACTORS**.
- Corporate agents, see **CORPORATIONS**, 6, 7.
- Declaration of agent to prove authority, see **CONTRACTS**, 4.

1. **PRINCIPAL AND AGENT—PURCHASE OF GOODS BY AGENT—AUTHORITY—RECOGNITION AND ACQUIESCENCE—REPRESENTATIONS OF GENERAL MANAGER—ESTOPPEL.** Where goods were sold to one claiming to be an agent of the defendant, and the vendor twice made inquiry at defendant's office and was referred to a certain room, supposed to be a department of defendant's business, and was there each time assured that the goods would be paid for by defendant as agreed by the agent, the defendant, upon his return from abroad, cannot escape liability for the goods by showing that they were purchased for an incorporated company doing business in said room, in which defendant was only a stockholder, and that defendant's general manager in charge of his business did not know that the company had been incorporated. *Haner v. Furuya*..... 122
2. **PRINCIPAL AND AGENT—ACTION FOR COMMISSIONS—CASH SALES—ACCEPTANCE OF GOODS IN LIEU OF CASH.** In an action for specified commissions on the sale of machinery, under a written contract authorizing only cash sales, the acceptance by the principal of second-hand machinery in lieu of the cash would be the equivalent of cash; and the failure to take cash could not be set up to defeat the agent's commissions. *Irwin v. Buffalo Pitts Co.*..... 346
3. **PRINCIPAL AND AGENT—ACTION FOR COMMISSIONS—DEFENSES—EVIDENCE.** Upon a claim by defendant that plaintiffs were to sell certain secondhand machinery and obtain commissions due them therefrom, evidence as to what was done with the machinery is admissible as a circumstance for the jury. *Id.*..... 346

PRINCIPAL AND SURETY:

See **INDEMNITY**.

Estoppel of surety, see **ESTOPPEL**, 2-6.

Judgment in different sums not misjoinder, see **ACTIONS**, 1.

Liabilities of sureties on bonds in legal proceedings, see **APPEAL AND ERROR**, 49, 50.

PRIVILEGED COMMUNICATIONS:

Letters, see **WITNESSES**, 4.

PROBABLE CAUSE:

See **MALICIOUS PROSECUTION**, 10.

PROBATE:

Decrees as proof of heirship, see **DESCENT AND DISTRIBUTION**, 3.

Fees, see **CONSTITUTIONAL LAW**, 2; **STATUTES**, 1; **TAXATION**, 3.

PROCESS:

See **INJUNCTION**.

Entry of order without, see **COURTS**, 1.

In criminal prosecutions, see **CRIMINAL LAW**, 1-7, 23, 25.

Service by publication, vacation, see **JUDGMENT**, 3, 4.

In tax foreclosure cases, summons, see **TAXATION**, 1, 2.

Waiver of motion to quash, see **APPEARANCE**, 1.

PROHIBITION:

1. **PROHIBITION—ORIGINAL JURISDICTION OF SUPREME COURT—MANDATE—STATE LAND COMMISSIONER—SCHOOL LANDS—LEASE.** The only function of an original writ of prohibition by the supreme court being the restraint of judicial or quasi-judicial power, the supreme court has no original jurisdiction to issue a writ to prevent the state land commissioner from leasing certain lands and compelling him to advertise a lease of the same for sale at public auction, notwithstanding the writ was denominated a mandate, since it is in effect a writ of prohibition as to acts not judicial in character. *State ex rel. Pelton v. Ross*..... 399
2. **SAME.** The injunctive feature cannot be sustained as a necessary accompaniment of the main relief by mandamus. *Id.*..... 399

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROPERTY:

See **FIXTURES**, 1-3.

Adverse possession, see **ADVERSE POSSESSION**.

Community property, see **HUSBAND AND WIFE**, 1, 2.

Division of, see **DIVORCE**, 3-5.

Purchase of school site, see **SCHOOLS AND SCHOOL DISTRICTS**, 1-4.

Taking or damaging for public use, see **EMINENT DOMAIN**.

PUBLIC DEBT:

See MUNICIPAL CORPORATIONS, 10-12; SCHOOLS AND SCHOOL DISTRICTS, 1-4.

PUBLIC LANDS:

Contract to locate mining claims see CONTRACTS, 8-10.

Cutting timber on, liability for, see CONTRACTS, 2; CONTRIBUTION, 1.

Patent after death of wife, see DESCENT AND DISTRIBUTION, 1.

Possession and patent of settler, as against railroad, see ADVERSE POSSESSION, 6.

Right of way by user, see HIGHWAYS, 1.

1. PUBLIC LANDS—OYSTER RESERVES—STATE OYSTER COMMISSION—COUNTY BOARDS—POWERS—STATUTE—CONSTRUCTION—IMPLIED REPEAL OF PROVISIONS RELATING TO COUNTY BOARDS OF OYSTER COMMISSIONERS. Laws 1903, p. 340, creating a state oyster commission, prescribing duties practically the same as those of the county boards of oyster commissioners under Laws 1897, p. 299, and providing different fees and penalties for the same acts and violations, was clearly intended to give the whole control of oyster reserves to the state commission to the exclusion of the county boards, and impliedly entirely repeals the earlier law relating to the powers of county boards, which therefore have no further authority. *State ex rel. Hammond v. Ross*..... 233
2. PUBLIC LANDS—STATE LAND COMMISSIONER—POWERS—LEASE—INTEREST OF APPLICANT—MANDAMUS. As the commissioner of public lands acts upon applications to lease lands at his own discretion, and is under no obligation to offer lands for lease, mandamus to compel him to do so cannot be maintained by an applicant having no other interest in the land than that of the general public, such applicant not being a party beneficially interested. *State ex rel. Pelton v. Ross*..... 399
3. PUBLIC LANDS—CUTTING TIMBER—ACTION FOR DAMAGES—RIGHTS OF SETTLER. A settler on unsurveyed government land cannot recover damages for the cutting and removal of the timber, or for permanent injury to the freehold, since the title and right of action therefor is in the government. *Nickelson v. Cameron Lumber Co.*..... 569
4. PUBLIC LANDS — RAILROADS — CONGRESSIONAL GRANT — OCCUPIED LANDS — RIGHTS OF SETTLERS — NECESSITY OF CONDEMNATION. The grant of a railroad right of way across public lands, under Act Cong., March 3, 1875, does not attach to land occupied by a settler and subject to his settlement rights, until after condemnation thereof, as provided in § 3 of the act. *Slaght v. Northern Pac. R. Co.*... 576

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 1-4.

PUBLIC MONEY:

Unlawful expenditure, see COUNTIES, 1.

PUBLIC NUISANCE:

See NUISANCE, 1.

PUBLIC POLICY:

See CONTRACTS, 2.

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Reservation of school lands, see HIGHWAYS, 1.

Right of way, see RAILROADS, 1.

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WORKS:

Bonds, see INDEMNITY, 6, 7.

PUNISHMENT:

For contempt, see CONTEMPT, 3.

QUESTION FOR COURT:

See MALICIOUS PROSECUTION, 1.

QUESTION FOR JURY:

See CONTRACTS, 4, 5.

See MASTER AND SERVANT, 17, 28.

In criminal prosecutions, see CRIMINAL LAW, 29, 33.

Warranty and waiver, see SALES, 4.

RAILROADS:

Across public lands in possession of settler, see ADVERSE POSSESSION, 6.

Appropriation of property, see EMINENT DOMAIN, 1, 2.

Carriage of goods and passengers, see CARRIERS.

As employers, negligence, see MASTER AND SERVANT, 9, 14, 27.

Grants of land in aid, right of way, see PUBLIC LANDS, 4.

1. RAILROADS—RIGHT OF WAY—USE FOR PUBLIC PURPOSES—EJECTMENT—POSSESSORY ACTION AGAINST COMPANY. A possessory action can be maintained to recover possession of a railroad right of way, used and occupied by a railroad company for its roadbed for public purposes, where proceedings are stayed and the only effect of the judgment is to compel the company to make compensation for the property taken. *Id.*..... 576
2. SAME—ESTOPPEL—EXCUSABLE DELAY IN BRINGING SUIT The owner of premises is not estopped to bring ejectment against a railroad to recover possession of a railroad right of way by reason of several years delay, where the property was in litigation between him and the railroad company's grantors during said time, and the ejectment was commenced shortly after the final determination of such litigation. *Id.*..... 576

RAPE:

See CRIMINAL LAW, 7, 8.

RATIFICATION:

Of act of agent, see PRINCIPAL AND AGENT, 1.

Of acts of corporate officers, see CORPORATIONS, 1-6.

Of acts of factor, see FACTORS, 1.

Of purchase of school site, see SCHOOLS AND SCHOOL DISTRICTS, 2.

REAL ACTIONS:

See EJECTMENT, 1.

REAL PROPERTY:

See ADVERSE POSSESSION.

Possession, as part performance of oral contract, see FRAUDS, STATUTE OF, 1.

RECEIVERS:

Appointment in action to foreclose chattel mortgage, see CHATTEL MORTGAGES, 1.

Of corporation, see CORPORATIONS, 1.

RECORDS:

Of customs office, as evidence, see SHIPPING, 1.

Deed prior to patent, notice, see VENDOR AND PURCHASER, 1.

On appeal, see APPEAL AND ERROR; JUDGMENT, 2.

REHEARING:

See NEW TRIAL.

RELEASE:

Of community interests by husband, see HUSBAND AND WIFE, 1.

Of surety, see INDEMNITY, 2, 3.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 42.

REMITTITUR:

Of damages, see APPEAL AND ERROR, 39-41; DAMAGES, 4-7.

REMOVAL:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 6, 7.

Of fixtures, instructions to jury, see FIXTURES, 4, TRIAL, 9.

Of public officers, see OFFICERS, 1-3.

REPLEVIN:

Witnesses as to value, competency, see WITNESSES, 1.

REPLY:

See PLEADING, 1.

50-39 WASH.

REPUTATION:

See CRIMINAL LAW, 27.

RESCISSION:

Of contract of sale of goods, see SALES, 1, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 6.

RESIDENCE:

See DOMICILE.

RESIGNATION:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 6, 7.

RES JUDICATA:

See JUDGMENT, 1, 2.

RETURN:

Of election, see ELECTIONS 1.

REVIEW:

See APPEAL AND ERROR, 5, 6, 13, 18-38; CRIMINAL LAW, 2, 7, 32-34.

Removal of public officer, see OFFICERS, 2, 3.

REVIVAL:

Of judgment, see JUDGMENT, 6-8.

REVOCATION:

Of letters of administration, see EXECUTORS AND ADMINISTRATORS, 6, 7.

RIGHT OF WAY:

Across public lands in possession of settler, see ADVERSE POSSESSION, 6.

Of railroads, see RAILROADS, 1, 2; PUBLIC LANDS, 4.

Rules of navigation, see COLLISION, 1.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 2, 8-10, 17.

ROADS:

See HIGHWAYS.

SALES:

See CONTRACTS, 1; PLEADING, 9.

By agents, see PRINCIPAL AND AGENT, 2, 3.

Of corporate stock and assets, see CORPORATIONS, 1-5.

Evidence establishing, see APPEAL AND ERROR, 25.

Of goods *in transitu*, see CARRIERS, 2-4.

Of lease of school lands, see PROHIBITION, 1, 2; PUBLIC LANDS, 2.

SALES—CONTINUED.

Of lots, as notice of adverse claim, see **ADVERSE POSSESSION**, 2.

Of realty, see **VENDOR AND PURCHASER**.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**, 2.

1. **SALES—STANDING TIMBER—RESCISSION—FRAUD—FALSE REPRESENTATIONS AS TO QUALITY—INSPECTION BY VENDEE.** A sale of standing timber and sawlogs cannot be rescinded by the vendee for false representations of the vendor as to quality, where the vendee had lived for a long time on the adjoining land, had twice gone over the land with a view of purchasing, and no claim is made that opportunity to make examination was not available. *Hulet v. Achey*..... 91
2. **SAME—WARRANTY AS TO NUMBER OF LOGS—BREACH—RESCISSION—DAMAGES.** It is not ground for rescinding a contract for the purchase of standing timber that there was a breach of a written warranty as to the number of sawlogs on the land, the remedy being by an action at law for damages. *Id.*..... 91
3. **SALES—WARRANTY—EVIDENCE BY PAROL TO VARY WRITING.** Evidence of an oral warranty of a gasoline engine is not admissible where it was sold by a written contract referring to a printed catalogue for the terms of the warranty, which must control, and cannot be varied by parol. *Buchanan v. Laber*..... 410
4. **SALES—WARRANTY—WAIVER—QUESTION FOR JURY.** In an action for breach of warranty on the sale of an engine it is not necessary to show notice to the manufacturer of defects within five days as provided in the contract, where the evidence tends to show a waiver of the notice, making the waiver and warranty questions for the jury. *Id.*..... 410
5. **SALES—FAILURE TO DELIVER—MEASURE OF DAMAGES—MARKET VALUE AT POINT OF DELIVERY.** The measure of damages for the failure of the vendor to deliver hay and oats, sold in Seattle, for shipment to Alaska before the close of navigation, for resale on the Dawson market, is the net profit that could have been realized on the Dawson market, where by reason of the default the vendees were unable to obtain other goods during the current season. *Lilly v. Lilly, Borgardus & Co.*..... 337

SATISFACTION:

See **COMPROMISE AND SETTLEMENT**, 1.

SCHOOL LANDS:

Lease of, see **PUBLIC LANDS**, 2.

Preventing lease, see **PROHIBITION**, 1, 2.

Reservation of, construction, see **HIGHWAYS**, 1.

SCHOOLS AND SCHOOL DISTRICTS:

1. **SCHOOLS AND SCHOOL DISTRICTS—PURCHASE OF BUILDING SITES—ULTRA VIRES.** Under Bal. Code, § 2367, the board of directors of school district No. 10, Pierce county, has authority to purchase a site for a high school building for the sum of \$32,000, when it did not exceed the constitutional limit of indebtedness of the district. *Nicholas v. School District*..... 137
2. **SAME—RATIFICATION OF PURCHASE OF SITE—ELECTION AUTHORIZING ERECTION OF SCHOOL BUILDING.** An illegal or invalid purchase of a high school site by a school district board is impliedly ratified by a vote of the district at a special election, authorizing the building of a high school thereon and the issuance of bonds therefor. *Id* 137
3. **SAME—SPECIAL ELECTIONS FOR BONDS—CONDUCT OF—REQUISITES.** Bal. Code, §§ 2398-2405, prescribing the method of conducting special school elections for the validation of illegal indebtedness, is a special act and has no reference to an election to authorize the issuance of bonds for the purpose of erecting a high school building. *Id.* 137
4. **SAME—CANVASS OF VOTES—EFFECT—REVIEW BY COURTS.** In a proceeding for an injunction to restrain the issuance of school district warrants, authorized at a special election for the purpose of erecting a high school building, the final return of the canvassing board, declaring the result, after canvassing the votes, regularly made and not impeached for fraud, nor attacked in any proceeding to obtain a review thereof, is final and conclusive on the courts as to the number of votes cast. *Id.*..... 137

SECONDARY EVIDENCE:

In criminal prosecutions, see **CRIMINAL LAW**, 11.

SEPARATE PROPERTY:

See **EXECUTORS AND ADMINISTRATORS**, 9.

SETTLEMENT:

See **COMPROMISE AND SETTLEMENT**, 1.

See **FACTORS**, 1.

By executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 8-10.

Of statement of facts, see **APPEAL AND ERROR**, 12, 14.

SETTLERS:

On unsurveyed land, rights, see **PUBLIC LANDS**, 3.

Rights against grant of railroad right of way, see **PUBLIC LANDS**, 4.

Statute of limitations, when begins to run, see **ADVERSE POSSESSION**, 6.

SHIPPING:

Accident to employees on lighter, see **MASTER AND SERVANT**, 30, 31.

Collision, see **COLLISION**, 1.

Delivery at "ship's tackle," see **CARRIERS**, 1.

Personal injuries, instructions, see **CARRIERS**, 10.

SHIPPING—CONTINUED.

1. **SHIPPING—OWNERSHIP OF VESSEL—EVIDENCE—NAME OF COMPANY—VARIANCE.** In an action against a steamship company, a prima facie case of ownership of a vessel is shown by answers to interrogatories, and by certified copies of records from the United States custom office, showing that she was registered as owned by the company, and by an admission that she had ever since been operated by the company; and any variance therein by the omission of the word "The" in the corporate name of the company is immaterial. *Carlson v. White Star Steamship Co.*..... 394

SIDEWALKS:

See **MUNICIPAL CORPORATIONS**, 7-9.

SPECIFICATIONS:

Drawn by contractor, defects, see **CONTRACTS**, 3-6.

SPECIFIC PERFORMANCE:

See **VENDOR AND PURCHASER**, 3-5.

STATE LANDS:

See **PUBLIC LANDS**, 1, 2.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 11-16.
Costs for, on appeal, see **APPEAL AND ERROR**, 47.

STATES:

Power to confine insane persons, see **CONSTITUTIONAL LAW**, 1.

Public lands, see **PUBLIC LANDS**, 1, 2.

Public work, bonds, see **INDEMNITY**, 6, 7.

1. **STATES—CONTRACTS—EMPLOYMENT OF ARCHITECT FOR STATE CAPITOL ANNEX—NOT IN WRITING—STATE CAPITOL COMMISSION—POWERS.** The employment of a supervising architect for the erection of the capitol annex is not required to be by written contract; since Laws 1893, p. 462, § 4, providing that all contracts made with the board of state capitol commissioners shall be in writing, indorsed "approved" by a majority of the board, etc., applies only to contracts for construction and material, and not to an agreement with the architect to be selected and employed under § 6 of the act, which provides that his compensation is to be fixed by, and that he is removable at the pleasure of, the board, the law further requiring the architect to give bond for the faithful performance of his duties, while § 7 requires contractors to give bond for the faithful performance of their contracts. *Ritchie v. State*..... 95
2. **SAME EXTRA COMPENSATION—MODIFICATION OF CONTRACT—CLAUSE REQUIRING WRITTEN AGREEMENT.** A written contract whereby the state capitol commission employed an architect for the erection of the capitol annex, which provides that the architect shall not be

STATES—CONTINUED.

entitled to any extra compensation unless previously agreed upon in writing, does not preclude the contracting parties from thereafter modifying the contract or making a further contract for extra compensation without a writing; but the terms of the written contract may be considered in determining the fact of additional employment.
Id...... 95

STATUTES:

See CONTEMPT, 2, 3; COUNTIES, 1; CRIMINAL LAW, 9, 30; DEATH; ELECTIONS, 1; EMINENT DOMAIN, 1, 4; EXEMPTIONS, 1; HIGHWAYS, 1; HUSBAND AND WIFE, 2; INFANTS, 2; JUDGMENT, 4, 6-8; JURY, 1; MANDAMUS, 1; MASTER AND SERVANT, 1, 2, 13; NEW TRIAL, 4; OFFICERS, 1-3; PUBLIC LANDS, 1, 4; SCHOOLS AND SCHOOL DISTRICTS, 1, 3; TAXATION 2, 3; TRIAL, 1, 2.

Governing state contracts, see STATES, 1.

Municipal assessments, see MUNICIPAL CORPORATIONS, 2.

National bank, see BANKS AND BANKING, 1.

Statute of frauds, see FRAUDS, STATUTE OF.

Statute of limitations, see LIMITATION OF ACTIONS.

Validity, see APPEAL AND ERROR, 1.

1. STATUTES—TITLE OF ACT—SUFFICIENCY. Laws 1903, p. 290, entitled an act relating to the fees of county officers, and which provides for an *ad valorem* charge upon estates in probate, called a clerk's fee, in the nature of a property tax, violates art. 2, § 19 of the constitution providing that no bill shall embrace more than one subject, which shall be expressed in the title. *State ex rel. Nettleton v. Case*..... 177

STENOGRAPHERS:

For grand jury, see COUNTIES, 1.

STIPULATIONS:

Waiver of, see MECHANICS' LIENS, 1.

STOCK:

Bank stock, transfer after liquidation, see BANKS AND BANKING, 1.

Reissue and sale by corporation, see CORPORATIONS, 4-5.

STOCKHOLDERS:

See CORPORATIONS.

STREET RAILROADS:

1. STREET RAILWAYS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE. The driver of a wagon, which was struck by a street car, was guilty of contributory negligence, and a nonsuit is properly directed, where on meeting an approaching car he looked back and saw another car coming from behind on the opposite track fifty or sixty yards away, but nevertheless turned out upon such track without looking to see where the car was, and was struck before he had time to get off the track. *Coats v. Seattle Electric Co.*..... 386

STREETS:

- Excavation, damage, see EMINENT DOMAIN, 2.
- Injuries from defects in, see MUNICIPAL CORPORATIONS, 5-9.

STRIKES:

- Enjoining picketing, see INJUNCTION, 1.

SUBROGATION:

1. SUBROGATION—LOAN TO PAY DEBTS OF ESTATE—WHEN NOT A VOLUNTEER. A mortgagee who in good faith loans money to one to whom the lands of an estate had been partitioned, and the money is used to pay the debts of the estate, is not a mere volunteer and is entitled to be subrogated to the rights of the creditors, upon the failure of his security through defects in the partition proceedings. *Wilson v. Hubbard*..... 671
2. SAME—RE-INSTATING REDEEMED MORTGAGE. Upon a defense to the foreclosure of a void mortgage given by a guardian without authority, the plaintiff may plead the fact of a former valid mortgage on the property, which was redeemed by the guardian with the money loaned on the mortgage in suit, and is entitled to an equitable subrogation reinstating the former mortgage. *Id.*..... 671

SUIT:

- See ACTION.

SUMMONS:

- For publication, vacation, see JUDGMENT, 3, 4.
- In tax foreclosure, see TAXATION, 1.

SUNDAY:

- Sunday laws, compelling enforcement, see MANDAMUS, 1.

SUPERSEDEAS:

- On appeal, see APPEAL AND ERROR, 7, 8, 10.

SUPPLEMENTARY PLEADING:

- See PLEADING, 8; TENANCY IN COMMON, 1.
- Order refusing, when reviewable, see APPEAL AND ERROR, 5.

SUPPORT:

- Nonsupport as ground for divorce, see DIVORCE, 1.

SURPRISE:

- See PLEADING, 7.
- As ground for continuance or amendment, see CONTINUANCE, 1.
- Ground for new trial, see NEW TRIAL, 2, 3, 11, 12.

TAXATION:

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 1-4.

Of costs on appeal, see APPEAL AND ERROR, 43-48.

Of estates, see STATUTES, 1.

Jurisdiction depending on question of validity, see APPEAL AND ERROR, 1.

Municipal debt, outstanding taxes as assets, see MUNICIPAL CORPORATIONS, 10-12.

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 3.

1. TAXATION—FORECLOSURE—JURISDICTION—PROCESS—REQUISITES—NAME OF OWNER. A summons in foreclosure of a delinquency tax certificate is defective and the judgment is without jurisdiction, where the name of the owner of record was stated in the tax rolls and in the certificate, and was not given in the summons, but the name of a stranger to the title was inserted instead; and the tax deed is properly cancelled where the court finds that the true owners had no actual knowledge of the pendency of the tax foreclosure. *Anderson v. Turatt*..... 155
2. TAXATION—FORECLOSURE—APPEAL—TIME FOR TAKING. Laws 1903, § 4, providing that an appeal from a judgment in a tax lien foreclosure shall be taken within thirty days, applies to a judgment dismissing the action. *Harris v. Levy*..... 158
3. EXECUTORS AND ADMINISTRATORS—FEES—TAXATION—UNIFORMITY—CLERK'S FEES BASED UPON VALUATION OF ESTATE—PROPERTY TAX—VALIDITY. Laws 1903, p. 290, prescribing a scale of fees, based upon the valuation of the estate, to be paid to the clerk of the court upon filing the first papers in probate, imposes a charge in the nature of a property tax upon estates, which is void because not uniform or levied in proportion to value, where the fees exacted are paid into the general fund of the county and have no relation to the services rendered in the administration of the estate. *State ex rel. Nettleton v. Case*..... 177

TENANCY IN COMMON:

Notice of hostile claim, see ADVERSE POSSESSION, 2.

1. TENANCY IN COMMON—MECHANICS' LIENS—PURCHASE OF OUTSTANDING LIENS—PLEADING—REAL PARTY IN INTEREST—SUPPLEMENTAL ANSWER SHOWING PLAINTIFF TO BE TRUSTEE OF COTENANT—SUFFICIENCY. Where the leasehold interests of tenants in common were being subjected to a mechanics' lien foreclosure, and one B purchased the interests of the plaintiff and was substituted as party plaintiff in the foreclosure suit, a supplemental answer by two of the defendants states a good defense to the action, where it alleges that B was not the real party in interest, but was the agent and trustee

TENANCY IN COMMON—CONTINUED.

of their codefendant, who had purchased the liens of the plaintiff; since the codefendant as a tenant in common cannot buy up an outstanding incumbrance and foreclose against his cotenants without showing an exclusive liability for the whole thereof; and it is error to refuse leave to file such an answer. *Burnett v. Ewing*..... 45

TENDER:

Of purchase price, see **VENDOR AND PURCHASER**, 4, 5.

TERMS:

Of office, see **OFFICERS**, 1-3.

Upon granting new trial, see **JUDGMENT**, 12.

TIMBER:

Cutting on unsurveyed land, see **PUBLIC LANDS**, 3.

Sale of standing timber, see **SALES** 1, 2.

TIME:

As essence of contract for sale of realty, see **VENDOR AND PURCHASER**, 4.

For taking appeal, in tax foreclosure, see **TAXATION**, 2.

TITLE:

See **EJECTMENT**, 1; **EMINENT DOMAIN**, 1-4.

After-acquired title of vendor, see **VENDOR AND PURCHASER**, 3.

In assumed name, see **DEEDS**, 1, 2.

Claim of, see **VENDOR AND PURCHASER**, 1.

Color of title, see **ADVERSE POSSESSION**, 1, 3.

Of grantors as heirs, statements, see **ESTOPPEL**, 7.

Of government, contract for cutting timber, see **CONTRACTS**, 2.

Statutes, see **STATUTES**, 1.

Tax titles, see **TAXATION**, 1.

Unsurveyed land, settler, see **PUBLIC LANDS**, 3.

TORTS:

See **MALICIOUS PROSECUTION**.

Causing death, see **DEATH**, 1.

Contribution against joint tort-feasor, see **CONTRIBUTION**, 1.

Destruction of fish traps, see **WATERS AND WATERCOURSES**, 4.

Employees, see **MASTER AND SERVANT**, 28-30.

Indemnity, accrual of action, see **LIMITATION OF ACTIONS**, 1.

Of officers of corporation, see **CORPORATIONS**, 6, 7.

Of partnership, see **ANIMALS**, 2; **PARTIES**, 2.

Reviving judgment upon, see **JUDGMENT**, 8.

TRANSCRIPTS:

Costs for, on appeal, see **APPEAL AND ERROR**, 45.

Of record for purpose of review, see **APPEAL AND ERROR**, 14-16.

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See CONTINUANCE; DIVORCE, 1-6; NEW TRIAL.

Amendment, failing to pass upon, see APPEAL AND ERROR, 35.

Upon appeal from municipal assessment, see MUNICIPAL CORPORATIONS, 1.

For breach of contract in general, see CONTRACTS, 2-10.

Breach of warranty, see SALES, 3, 4.

Comment on facts, see CRIMINAL LAW, 27, 28, 30.

Cross-examination, see CRIMINAL LAW, 12.

For damages, see DAMAGES.

Exceptions for purpose of review, see APPEAL AND ERROR, 4-6.

Exclusion of co-defendant, see CRIMINAL LAW, 26.

Fees, see COSTS, 1.

Instructions, see CARRIERS, 6, 7, 10; CONTRACTS, 6; CRIMINAL LAW, 8, 29-31; DAMAGES, 3, 10, 11; FIXTURES, 4; MALICIOUS PROSECUTION, 1; MASTER AND SERVANT, 21-26; MUNICIPAL CORPORATIONS, 5, 6; TRIAL, 9.

For personal injuries, see CARRIERS, 6-10; MUNICIPAL CORPORATIONS, 5-9; STREET RAILROADS, 1.

Question for court, see CRIMINAL LAW, 30, 33.

Questions for jury, see CRIMINAL LAW, 29, 33; MASTER AND SERVANT, 17, 28; CONTRACTS, 4, 5; SALES, 4.

Remanding assessment proceeding, see APPEAL AND ERROR, 42.

Review of findings and verdicts on appeal, see APPEAL AND ERROR, 20-27, 33, 34.

Review of instructions on appeal, see APPEAL AND ERROR, 28-31.

1. TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION. It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws 1903, p. 50, and error cannot be predicated thereon. *Fleming v. Wilson*..... 106
2. TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION. It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws 1903, p. 50, and error cannot be predicated thereon. *Hart v. Cascade Timber Co.*..... 279
3. TRIAL—OBJECTIONS TO TESTIMONY—SUFFICIENCY—APPEAL AND ERROR—REVIEW. Where it is sought to qualify a former wife as a witness by showing a divorce, an objection that evidence offered to prove the divorce was "incompetent, irrelevant and immaterial," does not raise the objection that it was not the best evidence, and will not be entertained for the first time in the supreme court. *State v. Nelson*..... 221
4. TRIAL—ARGUMENT OF COUNSEL—READING LAW TO JURY. It is not prejudicial error that counsel in argument to the jury was permitted to read from law books, when the same was in accord with

TRIAL—CONTINUED.

- the law given by the court to the jury, and the jury was not misled nor the party prejudiced thereby. *Williams v. Spokane Falls etc. R. Co.*..... 77
5. MASTER AND SERVANT—NEGLIGENCE—INDEMNITY—FACT THAT DEFENDANT CARRIES ACCIDENT INSURANCE—TRIAL—CONDUCT OF ATTORNEY. It is reversible error for counsel to make statements and ask questions in the presence of the jury from which it would be inferred that the defendant in a personal injury case carried casualty insurance, and to make an offer of proof that a witness was an attorney for the casualty company which insured the defendant. *Stratton v. Nichols Lumber Co.*..... 323
6. SAME—CONDUCT OF ATTORNEY—STATEMENTS OUTSIDE OF EVIDENCE. It is prejudicial error for counsel, during the examination of witnesses, to continually and notwithstanding repeated objections, interpolate statements of fact to such an extent that the jury might confuse the same with the evidence of the witness. *Id.*..... 323
7. TRIAL—OPENING STATEMENT OF COUNSEL—WHEN GROUND FOR DISMISSAL. A judgment for defendant on the merits, based upon the plaintiff's opening statement to the jury, is justified only when facts are admitted from which it affirmatively appears that there is no cause of action or that there is a complete defense, and the omission to state a case fully is not ground for such a judgment. *Brooks v. McCabe & Hamilton.*..... 62
8. TRIAL—VERDICT—UNCERTAINTY—INTEREST ADDED TO VERDICT. A verdict for a specified sum, "with interest," is not void for uncertainty, where the action was for money loaned at a certain date, and both the amount and date were admitted in the answer; and it was proper to add to the verdict interest at the legal rate from such date, and include it in the judgment. *Brown v. Gillett.*..... 485
9. SAME—INSTRUCTIONS. Reading judicial decisions to the jury on the complex question of what constitutes a fixture is not to be commended. *Filley v. Christopher.*..... 22

TRUSTS:

- Assignor of bill of lading as trustee of express trust, see CARRIERS, 4.
- Between cotenants, see TENANCY IN COMMON, 1.
- Holder of mining claims, expenditures, see CONTRACTS, 8-10.
- Waging suit as trustee, see CORPORATIONS, 1.

ULTRA VIRES:

- See CORPORATIONS, 3-4; SCHOOLS AND SCHOOL DISTRICTS, 1.

USER:

- Establishment of highway, see HIGHWAYS, 1.

VACATION:

See JUDGMENT, 3-5.

Of default, finality, see APPEAL AND ERROR, 3.

Failing to vacate void partition, when harmless, see APPEAL AND ERROR, 38.

Of judgment against infant, see INFANTS, 2.

VALIDATION:

Of illegal indebtedness, statute, see SCHOOLS AND SCHOOL DISTRICTS, 3.

VARIANCE:

See CRIMINAL LAW, 7, 25; MUNICIPAL CORPORATIONS, 6.

As to ownership of dog, see ANIMALS, 2.

Between pleading and proof in civil action, see PLEADING, 9.

VENDOR AND PURCHASER:

See SALES.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1.

1. VENDOR AND PURCHASER—DEED BEFORE PATENT—RECORDING—CHAIN OF TITLE—NOTICE TO SUBSEQUENT PURCHASERS. A deed by a homesteader prior to patent, after final proof and the issuance of the receiver's final receipt, is in the chain of title, although the receiver's receipt was not recorded, and the same transfers equitable title; and subsequent purchasers after issuance and recording of the patent are bound by the record of such former deed, from the patentee, although they had no actual notice thereof. *Peterson v. Sloss*... 207
2. SAME—PARTITION—PRIOR PURCHASERS. A partition agreement, made by a tenant in common after contracting to convey his interests, is not binding upon subsequent purchasers from his grantee. *Id.*..... 207
3. VENDOR AND PURCHASER—FAILURE OF TITLE—AFTER-ACQUIRED TITLE OF VENDOR—CONTRACT OF PURCHASE—CONSTRUCTION—SPECIFIC PERFORMANCE. The after-acquired title of vendors under a land contract inures to the benefit of the vendees, where the contract was extended during the pendency of a suit in which vendors' title failed, notwithstanding stipulations in the contract giving the vendees a right to an immediate return of their money and notes in case of failure of the title; since such provision was inserted in the contract for the benefit of the vendees, and cannot be taken advantage of by the vendors, upon acquiring title, to defeat an action for specific performance. *Showalter v. Sorensen*..... 621
4. VENDOR AND PURCHASER—TIME OF ESSENCE OF CONTRACT—FORFEITURE—TENDER PRIOR TO NOTICE. A contract for the purchase of land, in which time is of the essence, is not forfeited in equity upon default in payment of an installment of the purchase price, where tender is made before affirmative action on the part of the vendor in declaring a forfeiture, nor where the vendor extends the time for payment. *Zeimantz v. Blake*..... 6

VENDOR AND PURCHASER—CONTINUED.

5. **SAME — TENDER — AMOUNT OF — ESTOPPEL TO QUESTION — SPECIFIC PERFORMANCE—DEFENSES.** Where the vendee tendered the amount which he claimed to be due on the purchase price of land, and the vendor refused the tender and defended an action for specific performance on the ground that there was no liability whatsoever under the contract, he is estopped to object that the tender was insufficient in amount. *Id.*..... 6
6. **VENDOR AND PURCHASER—FRAUD—RESCISSION BY VENDEE—NEGLECT TO INVESTIGATE.** There can be no rescission for false representations of the vendor in representing the length of the lots, that the premises were unincumbered, and that an abstract thereof was brought down to date, where the abstract submitted to the vendees showed on its face that it was about a year from date, and the vendees visited the property and had an opportunity to examine the title, the records showing a mortgage subject to a contract assigned to the vendees. *Lake v. Churchill.*..... 318

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Of administration of estate, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

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See **TRIAL**, 8.

For damages, excessive, see **DAMAGES**, 4-7.

Review on appeal, see **APPEAL AND ERROR**, 20-27; **CRIMINAL LAW**, 32-34.

Setting aside, see **MASTER AND SERVANT**, 18; **NEW TRIAL**.

Wrongful death, exonerating servant, effect as to master, see **MASTER AND SERVANT**, 27.

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Of cost bill on appeal, see **APPEAL AND ERROR**, 44.

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Evidence of ownership, see **SHIPPING**, 1.

VEXATIOUS SUIT:

See **CORPORATIONS**, 1, 2.

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See **MASTER AND SERVANT**, 6, 7, 27, 30.

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Of damages against factor, see **FACTORS**, 1.

Defect of parties, see **PARTIES**, 2.

Of demurrer, see **PLEADING**, 4.

Of error in complaint by answering, see **APPEAL AND ERROR**, 4.

Of error on special appearance, see **APPEARANCE**, 1.

Of illegality of contract, see **CONTRACTS**, 2.

Of jury, recovery as costs of jury fee advanced, see **COSTS**, 1.

Of notice of defects, see **SALES**, 4.

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Compelling tax levy to pay, see MUNICIPAL CORPORATIONS, 10-12.

Forbidding payment, see COURTS, 1.

School district warrants, see SCHOOLS AND SCHOOL DISTRICTS, 4.

WARRANTY:

See SALES, 2-4.

WATERS AND WATER COURSES:

Use for manufacturing not public use, see EMINENT DOMAIN, 4.

1. **WATERS—INJUNCTION—OBSTRUCTION OF STREAM BY LOGGING OPERATIONS—OVERFLOWING LANDS—TEMPORARY INJUNCTION—ADMISSION OF ACTS.** A temporary injunction pending the action is properly granted to restrain a logger from storing logs in a river or slough in such a manner as to overflow its banks, wash away the soil, and prevent the cultivation of plaintiff's land, where the defendant's affidavit on the hearing admits the commission of such acts and the plaintiff's title to the land. *White v. Codd*..... 14
2. **SAME—MANDATORY INJUNCTION—REMOVAL OF LOGS, WHEN REQUIRED.** A mandatory injunction pending the action may be granted requiring the removal of logs from the plaintiff's premises, where it clearly appears that the defendant, without any conceivable right, has obstructed a stream and floated logs upon the plaintiff's lands, and left them there, preventing cultivation of the land. *Id.*.... 14
3. **SAME—PRESCRIPTIVE RIGHTS—OBSTRUCTION OF STREAM FOR SIX YEARS.** No prescriptive rights are acquired by the obstruction of a navigable river and the flooding of lands by the storage of logs therein for a period of six years. *Id.*..... 14
4. **WATERS—OBSTRUCTION OF NAVIGATION—FISH TRAPS—AUTHORITY FOR—CONSENT OF SECRETARY OF WAR—EVIDENCE.** In an action for the wilful destruction of fish traps maintained by the plaintiff in a navigable stream, a certificate from the Secretary of War granting permission to maintain the traps is admissible in evidence to show plaintiff's good faith in endeavoring to comply with the law, especially where he also obtained a state license. *Fowler v. Harrison*..... 617
5. **SAME—WILFUL DESTRUCTION OF FISH TRAPS—JUSTIFICATION—OBSTRUCTIONS—DAMAGES.** The wilful and wanton destruction of fish traps in a navigable stream, by running into the same with a steamboat, is not justified by the fact that the traps were unlawfully maintained, where the channel of the river was not so obstructed as to impede navigation; and such acts render the wrongdoers liable in damages to the owner of the traps. *Id.*..... 617

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Public ways, see HIGHWAYS.

WITNESSES:

See EVIDENCE.

Absence of, as ground for continuance, see CONTINUANCE, 2.

Absence, ground for new trial, see NEW TRIAL, 2, 4, 5, 10.

Admissions of wife, when not privileged, see CRIMINAL LAW, 16.

Affidavit of absent or newly discovered, see NEW TRIAL, 4, 10.

Credibility of, see CRIMINAL LAW, 29, 33.

Exclusion, see CRIMINAL LAW, 26.

Impeachment by letters, see EVIDENCE, 1, 2.

Right of accused to confront, see CRIMINAL LAW, 26.

Testimony of accomplices, see CRIMINAL LAW, 13-16.

1. WITNESSES—COMPETENCY ON VALUATIONS. In replevin a witness is shown to be competent on the subject of the value of the property when she stated that she knew the cost of the articles and their value. *Glass v. Buttner*..... 296
2. WITNESSES—COMPETENCY—DIVORCED WIFE. The divorced wife of the accused is a competent witness against him, except as to communications during marriage. *State v. Nelson*..... 221
3. SAME—HUSBAND OF PARAMOUR—ADULTERY—EVIDENCE. The husband of the alleged paramour of the accused is a competent witness against one accused of living in a state of adultery, when the paramour is not on trial or charged with crime. *Id.*..... 221
4. SAME—ADULTERY—EVIDENCE—LETTERS OF PARAMOUR TO HUSBAND—LOSS OF PRIVILEGE—IMPEACHMENT OF WITNESS. Where an alleged paramour was offered as a witness to prove that she had not lived in a state of adultery with the accused, a letter written to her husband, inconsistent with her testimony, loses its character as a privileged communication when it is produced by the officers of the state, and is competent for the purposes of impeachment. *Id.*.. 221
5. WITNESSES—CREDIBILITY—CROSS-EXAMINATION. Upon cross-examination of a witness, it is proper to ask if he is in the employ of the party by whom he was called. *Stowe v. La Conner Trad. & Transp. Co.*..... 28

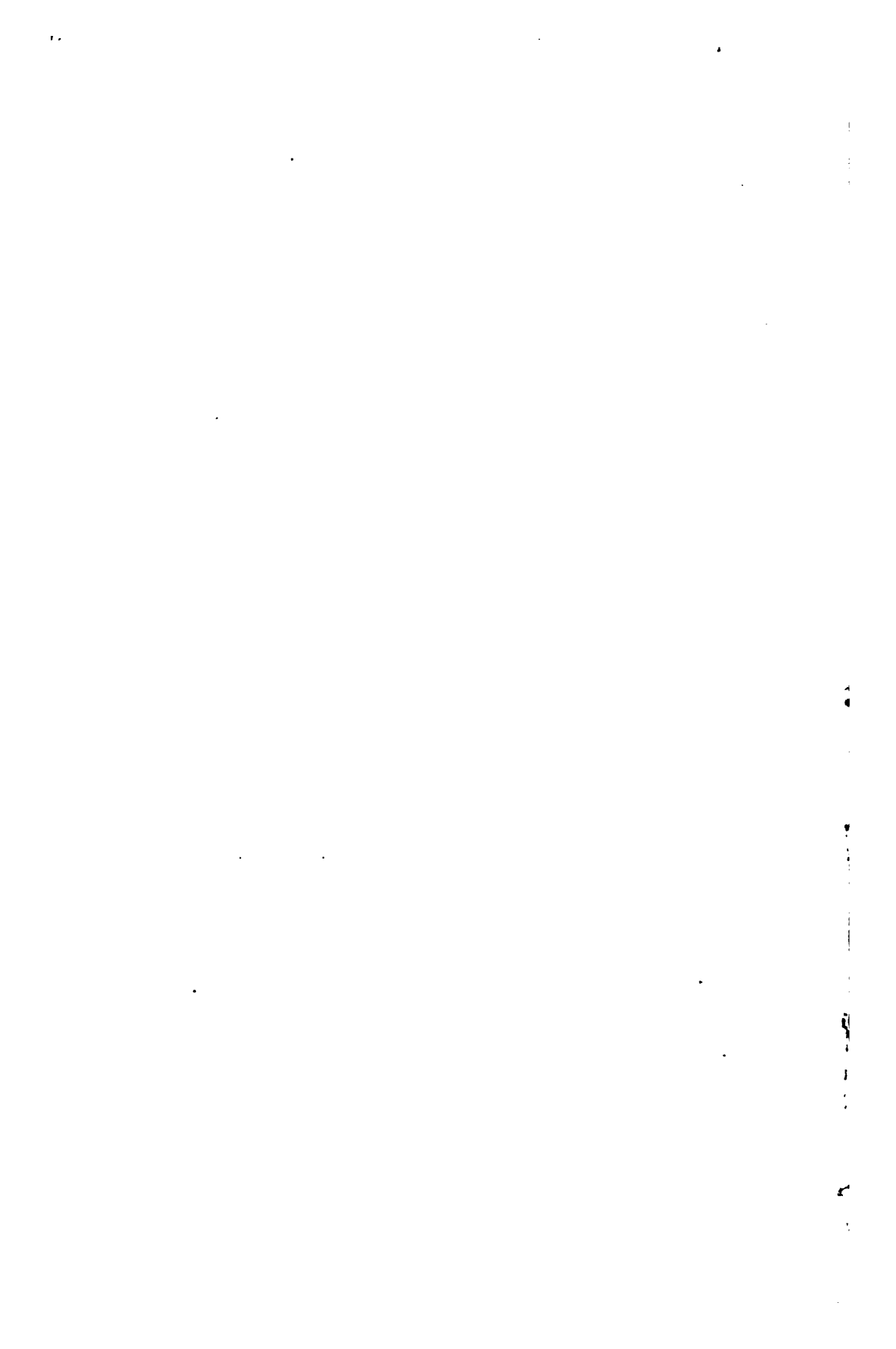
WORK AND LABOR:

Child labor, see MASTER AND SERVANT, 1, 20-23.

Liens for work and materials, see MECHANICS' LIENS.

WRITS:

See INJUNCTION; MANDAMUS; PROHIBITION.





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